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UNITED STATES REPORTS

VOLUME 338

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1948

AND

OCTOBER TERM, 1949

OPINIONS OF JUNE 27, 1949, CONCLUDED (END OF 1948 TERM)
DECISIONS FROM BEGINNING OF 1949 TERM
THROUGH FEBRUARY 13, 1950

WALTER WYATT
REPORTER

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ERRATA.

305 U. S. 362, line 32. "§ 21 (n)" should be "§ 23 (n)".
337 U. S. 923. In No. 746, the citation should be "171 F. 2d 964."

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.[1]
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.[2]
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.[3]
SHERMAN MINTON, Associate Justice.[4]

TOM C. CLARK, Attorney General.[3]
J. HOWARD McGRATH, Attorney General.[5]
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

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*Notes on p. IV.

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NOTES.

[1] Mr. Justice Murphy died at Detroit, Michigan, on July 19, 1949; funeral services were held in Our Lady of Lake Huron Church, and interment was in Rock Falls Cemetery, Harbor Beach, Michigan, on July 22, 1949. See *post*, p. VII.

[2] Mr. Justice Rutledge died at York, Maine, on September 10, 1949; funeral services were held in All Souls Unitarian Church, Washington, D. C., on September 14, 1949. See *post*, p. VII.

[3] The Honorable Tom C. Clark, of Texas, Attorney General of the United States, was nominated by President Truman on August 2, 1949, to be an Associate Justice; the nomination was confirmed by the Senate on August 18, 1949; he was commissioned August 19, 1949; took the oaths of office on August 24, 1949; and took his seat October 3, 1949. See *post*, p. IX

[4] The Honorable Sherman Minton, of Indiana, Judge of the United States Court of Appeals for the Seventh Circuit, was nominated by President Truman on September 15, 1949, to be an Associate Justice; the nomination was confirmed by the Senate on October 4, 1949; he was commissioned October 5, 1949, and took the oaths of office and his seat on October 12, 1949. See *post*, p. XI.

[5] The Honorable J. Howard McGrath, United States Senator from Rhode Island, was nominated by President Truman on August 2, 1949, to be Attorney General; the nomination was confirmed by the Senate on August 18, 1949; he was commissioned August 19, 1949; and he took the oath and entered on duty August 24, 1949.

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, Fred M. Vinson, Chief Justice.

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, Robert H. Jackson, Associate Justice.

For the Third Circuit, Harold H. Burton, Associate Justice.

For the Fourth Circuit, Fred M. Vinson, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Stanley Reed, Associate Justice.

For the Seventh Circuit, Sherman Minton, Associate Justice.

For the Eighth Circuit, Tom C. Clark, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Tom C. Clark, Associate Justice.

October 14, 1949.

(For next previous allotment, see 337 U. S. p. iv.)

DEATHS OF MR. JUSTICE MURPHY AND MR. JUSTICE RUTLEDGE.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 3, 1949.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, and MR. JUSTICE CLARK.

THE CHIEF JUSTICE said:

Since last this Court convened we have been saddened by the untimely deaths of Mr. Justice Murphy and Mr. Justice Rutledge. These tragic losses to the Court and the Nation are the more keenly felt because our brothers were stricken in the fullness of their great powers of mind and spirit, which were ever applied with selfless devotion to the work of the Court. In addition, we must contemplate the end of personal associations made precious by the courtesy, warmth, and friendliness that marked their every word and deed.

Frank Murphy devoted his life to public service. Except for one three-year period, his career, from the time of his Army service during the first World War until his death 32 years later, was one of service to his City, State, and Nation. During that time he held the positions of Assistant United States Attorney, Judge of the Recorder's Court of the City of Detroit, Mayor of Detroit, Governor General and then United States High Commissioner of the Philippine Islands, Governor of Michigan, Attorney General of the United States, and Associate Justice of this Court. In each of these positions of high trust and honor, Mr. Justice Murphy displayed a tenacity

of conviction and devotion to ideals that earned for him the respect and admiration of all. Though gentle and kindly of temperament, in defense of the fundamental rights of the accused and the underprivileged his spirit was that of a warrior. His passionate defense of the rights of minorities whose principles were anathema to him will stand as a monument to his honesty, integrity, and valor.

Wiley Blount Rutledge was a teacher until he took his seat on the bench. After conquering disease that early threatened his life, he taught successively at the law schools of the University of Colorado, Washington University at St. Louis, and the University of Iowa. At the two Universities last named, he assumed the additional burdens of the Deanship. He was appointed to serve on the United States Court of Appeals for the District of Columbia in 1939. In 1943 he took his seat on this bench. Beloved of his students, he became beloved of us all. His friendship was a source of great joy while he lived; it is a source of great pride now that he is gone. It was said of Mr. Justice Cardozo that he had a "passion for justice." No epitaph could be more fitting for Mr. Justice Rutledge, nor would he have wanted any other. His search for the right, the just, and the decent was unremitting. His devotion to this task so overtaxed his strength that he was taken from us in the prime of his years. But in our memories he remains—a revered teacher, a wise judge, and a faithful friend.

Saddened by our losses but inspired by the examples of devotion to duty which Mr. Justice Murphy and Mr. Justice Rutledge have provided for us, we turn to the work before us. At an appropriate time, the Court will receive the resolutions of the Bar in tribute to their memory.

APPOINTMENT OF MR. JUSTICE CLARK.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 3, 1949.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, and MR. JUSTICE CLARK.

THE CHIEF JUSTICE said:

Since the adjournment of the Court in June the President has nominated and, with the advice and consent of the Senate, has appointed Attorney General Tom C. Clark, of Texas, to be an Associate Justice of this Court in succession to Associate Justice Frank Murphy, deceased. He has presented his commission and has taken the oaths prescribed by law. It is ordered that his commission be recorded and that his oaths be filed.

The commission of MR. JUSTICE CLARK is in the words and figures following, viz:

HARRY S. TRUMAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Tom C. Clark of Texas I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and

fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges, and emoluments to the same of right appertaining, unto Him, the said Tom C. Clark, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this nineteenth day of August, in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States of America the one hundred and seventy-fourth.

HARRY S. TRUMAN.

By the President:
PEYTON FORD
Acting Attorney General.

APPOINTMENT OF MR. JUSTICE MINTON.

SUPREME COURT OF THE UNITED STATES.

WEDNESDAY, OCTOBER 12, 1949.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

THE CHIEF JUSTICE said:

The President has nominated and, with the advice and consent of the Senate, has appointed Circuit Judge Sherman Minton, of Indiana, to be an Associate Justice of this Court in succession to Associate Justice Wiley Rutledge, deceased. He has presented his commission and has taken the oaths prescribed by law. It is ordered that his commission be recorded and that his oaths be filed.

The commission of MR. JUSTICE MINTON is in the words and figures following, viz:

HARRY S. TRUMAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Sherman Minton of Indiana I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute

and fulfil the duties of that Office according to the Constitution and laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Sherman Minton, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the city of Washington this fifth day of October, in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States of America the one hundred and seventy-fourth.

HARRY S. TRUMAN.

By the President:
J. HOWARD MCGRATH
Attorney General.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Chief Justice Hughes[1]

MONDAY, MAY 8, 1950

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

MR. SOLICITOR GENERAL PERLMAN addressed the Court as follows:

May it please this Honorable Court: At a meeting of members of the Bar of the Supreme Court, held on November 4, 1949,[2] resolutions expressing their profound sorrow at the death of Chief Justice Charles Evans Hughes were offered by a committee, of which the Honorable John W. Davis was chairman.[3] Addresses on the

[1] MR. CHIEF JUSTICE HUGHES, who had retired from active service July 1, 1941 (313 U. S. p. III), died at the Wianno Club, Osterville, Massachusetts, on August 27, 1948. Funeral services were conducted at Riverside Church, New York City, on August 31, 1948, and interment was in Woodlawn Cemetery, New York City, on the same day.

[2] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Philip B. Perlman, Chairman, Mr. James F. Byrnes, Mr. William D. Mitchell, Mr. George Wharton Pepper, Mr. William Phillips, Mr. Henry L. Stimson, Chief Justice Arthur T. Vanderbilt, and Mr. Owen D. Young.

[3] The Committee on Resolutions consisted of Mr. John W. Davis, Chairman, Mr. Dean Acheson, Mr. Sidney S. Alderman, Judge Florence E. Allen, Mr. Douglas Arant, Mr. Colley W. Bell, Mr. Francis Biddle, Mr. J. Crawford Biggs, Chief Judge John Biggs, Jr., Mr.

resolutions were made by former Governor Nathan L. Miller of New York; former New York Appellate Division Justice Joseph M. Proskauer; the Honorable Charles Cheney Hyde, Professor Emeritus of International Law at Columbia University and Solicitor of the Department of State during the period when Mr. Hughes was Secretary of that Department; and the Honorable John Lord O'Brian, former Assistant Attorney General of the United States and a long-time associate of the late Chief Justice in many legal and political affairs before his elevation to the bench.[4] The resolutions, adopted unanimously, are as follows:

RESOLUTIONS

On the 27th of August 1948 in the eighty-seventh year of his life, Charles Evans Hughes, eleventh Chief Justice of the United States, departed this life. He had laid down the burdens of his great office "for reasons of health

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William Marshall Bullitt, Mr. Charles C. Burlingham, Mr. Pierce Butler, Mr. Emanuel Celler, Mr. Henry P. Chandler, Mr. Frederic R. Coudert, Mr. Homer S. Cummings, Chief Judge William Denman, Mr. Charles D. Drayton, Mr. Henry S. Drinker, Mr. John Foster Dulles, Mr. Charles Fahy, Mr. John S. Flannery, Mr. Robert V. Fletcher, Mr. William L. Frierson, Chief Judge Archibald K. Gardner, Chief Justice D. Lawrence Groner, Judge Augustus N. Hand, Chief Judge Learned Hand, Chief Judge Xenophon Hicks, Mr. Richard W. Hogue, Chief Judge Joseph C. Hutcheson, Jr., Mr. Francis R. Kirkham, Mr. Jacob M. Lashly, Chief Judge Bolitha J. Laws, Mr. Monte M. Lemann, Mr. Pat McCarran, Mr. Edwin McElwain, Chief Judge Calvert Magruder, Chief Judge J. Earl Major, Mr. Clarence E. Martin, Mr. Robert N. Miller, Mr. J. Blanc Monroe, Mr. George Maurice Morris, Chief Judge John J. Parker, Chief Judge Orie L. Phillips, Mr. Seth W. Richardson, Mr. Donald R. Richberg, Mr. Elihu Root, Jr., Mr. George H. Rublee, Mr. Charles B. Rugg, Judge Samuel H. Sibley, Mr. Willis Smith, Judge William M. Sparks, Chief Judge Harold M. Stephens, Judge Kimbrough Stone, Judge Thomas D. Thacher, Mr. Huston Thompson, Mr. Harrison Tweed, Mr. Charles Warren, Judge George T. Washington, Judge Curtis D. Wilbur, and Mrs. Mabel Walker Willebrandt.

[4] It is understood that these addresses will be published privately in a memorial volume to be prepared under the supervision of Mr. Charles Elmore Cropley, Clerk of this Court.

and age," as he said, on July 1, 1941. He carried however into his retirement and retained until his death the widespread admiration and affection which he had earned by a lifetime of devoted services to his profession and his country.

We, members of the Bar of the Supreme Court, meet today to place on record our estimate of the man and our appraisal of his labors.

His career belongs to history and we do not attempt to chronicle all of its incidents. Born of intellectual and cultured parents, he was trained by them in boyhood in the use of his exceptional mind. He early proved his mental power by consistently winning honors and distinction in his educational life. In 1884 when but 22 years of age he was admitted to the bar of the State of New York and from that time until his death, no matter how tempted to other pursuits, he remained a servant of the law.

Upon his admission he entered the employ of the firm of Chamberlain, Carter & Hornblower in the City of New York and four years later, after he had become a partner, he married Miss Antoinette Carter, daughter of the senior member of the firm. It was a most fortunate choice and she remained his beloved companion until her death in 1945 left a void that could not be filled.

He early interrupted his increasingly busy life at the bar by two years as a law teacher at Cornell University. And within little more than a decade after returning to the practice, he won public acclaim as counsel for committees of the Legislature of New York in the investigation of the gas and insurance companies.

Comparatively young and relatively unknown, he demonstrated an extraordinary capacity in dealing with complicated accounts, and in ascertaining and revealing the existence of abuses and framing legislation designed to prevent their continuance or recurrence. In the investigation of the life insurance companies especially, he attracted favorable public attention throughout the land

and was given principal credit for exposing and eradicating the illegal and objectionable practices that were then prevalent. His outstanding contribution in a matter of such vital Nation-wide importance soon reaped its deserved reward. Without his seeking, he was nominated and elected as Governor of the State in 1906 and reelected in 1908. Toward the end of his second gubernatorial term he was called by President Taft to the bench of the Supreme Court. This office he resigned after six years to become the Republican nominee for the presidency in 1916, and upon his defeat in the ensuing campaign he once more returned to active practice at the bar. In 1921 President Harding named him as Secretary of State. After four years in that office he again took on the work of a practicing lawyer. In 1928 he was elected a judge of the permanent Court of International Justice but retired from that position when President Hoover in 1930 nominated him for the Chief Justiceship.

It is notable that in all this chain of events he followed the rule, laid down by Benjamin Franklin, never to seek a public office and never to refuse one when offered. It could never be said of him that he was greedy for office. No nomination or appointment came to him of his own seeking. And his various terms of service were ended by his resignation. Thus he resigned as Governor to become a Justice of the Supreme Court; he resigned as Justice of the Supreme Court to become a nominee for the Presidency; he resigned as Secretary of State upon the election of President Coolidge; he resigned as Judge of the International Court to become Chief Justice of the United States.

When his biography comes to be written, it will be easy for the author to cull from his many opinions, speeches, and writings, passages that fully develop his philosophy of life. He was a self-contained and self-reliant man; never a silent one, yet not given overmuch to self-disclosure. But it is clear that from his earliest days he entertained a deep-rooted reverence for equal

justice under law. This was his ideal, this his guiding star, this his lifetime ambition to which he gave frequent expression and which he pursued with unswerving devotion both on the bench and at the bar.

In the great speech which he delivered at London, in Westminster Hall in 1924, on behalf of the American Bar Association, he gave eloquent utterance to his creed. Said he:

"The fundamental conception which we especially cherish as our heritage is the right to law itself, not as the edict of arbitrary power but as the law of a free people, springing from custom, responsive to their sense of justice, modified and enlarged by their free will to meet conscious needs and sustained by authority which is itself subject to the law—the law of the land. . . . We of the common law respect authority but it is the authority of the legal order. We respect those who in station high or humble execute the law—because it is our law. We esteem them but only as they esteem and keep within the law."

Even in private life he was not spared from public demands, as when President Wilson called on him to survey the aircraft program during World War I, or when in 1926 he headed a successful commission to reorganize the administrative agencies of the State. It was but natural, too, that his professional brethren should constantly call on him to lead and vitalize their various organizations. At one time or another he was President of the Association of the Bar of the City of New York, of the New York County Lawyers Association, of the New York State Bar Association, and of the American Bar Association.

His exalted conception of a lawyer's duty is illustrated by the fact that upon his resumption of practice after his campaign for the Presidency of the United States one of his first acts was to accept the presidency of the Legal Aid Society of New York City. The present usefulness of that organization is due in large part to the impetus he gave it. His idea of its purpose he stated in these words:

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"We are trying to make firm the foundations of the Republic through confidence in the administration of justice; through love of country; not of the flag in a sentimental way—that is well enough—but through love of the institutions of the country; in respect for the judicial institutions of the country and by the determination that when we say we will regard neither rich nor poor we mean not simply impartiality and integrity of courts; we mean actual advice, representation, the power of the expert bar, the strong man of democracy at the service of the weak."

Another incident illustrating his conception of a lawyer's duty occurred when the Assembly of the State of New York passed in 1920 a resolution expelling five members of the Socialist Party who had been regularly elected to that body. At once he stepped forward as the spokesman of public right and denounced the proceeding as thoroughly un-American. In a ringing open letter to the Speaker of the Assembly he wrote:

". . . it is absolutely opposed to the fundamental principles of our government for a majority to undertake to deny representation to a minority through its representatives elected by ballots lawfully cast. If there was anything against these men as individuals . . . they should be charged accordingly.

"But I understand that the action is not directed against these five elected members as individuals, but that the proceeding is virtually an attempt to indict a political party and to deny it representation in the Legislature. That is not, in my judgment, American government."

Be it said to the credit of the bar associations of the State and city, that, following the lead he gave them, they joined him in a no less ardent protest.

As an advocate at the bar he was earnest, forceful, and persuasive; in counsel, wise and exact. He possessed an extraordinary memory and a great capacity for the analysis of complicated facts and the determination of their weight and consequence. He gave to every case exhaustive scrutiny and could never be taken unawares or unpre-

pared. One who had large opportunity to observe him and other famous lawyers of his day has said: "He was a man whose equal I have never seen at the bar."

These faculties, together with a tireless industry, he carried with him to the bench. There, as his successor in office has said, "He was fired by a passion for prompt and faithful performance of the work of the Court." The word "passion" is particularly well chosen. To comment at this moment upon all the opinions which he rendered would be impossible, and selection of those foremost in importance would be hardly less difficult. He reasoned cogently and wrote clearly with a minimum of striving for literary ornament or display. But he served at a time when great and novel questions were to the fore. He took a large and statesmanlike view of the function of the Court and was determined that no act or word of his should lessen its dignity or usefulness.

He evidenced his jealous concern for the Court as an institution when the bill affecting the membership of the Court came forward during his term as Chief Justice. The measure was promoted on the ground, among others, that the efficiency of the Court would be improved by an enlargement of its membership. He reacted strongly to the implied reflection on the then efficiency of the Court and his letter on the subject to Senator Wheeler was probably a large contribution to the defeat of the bill.

His colleagues on the Court have spoken from time to time in praise of the manner in which he conducted the deliberations of the Court. How great was his contribution in conference they best can know. But the members of the bar who stood before him cannot forget his urbanity, his attentiveness, his helpfulness, nor the manner, at all times kindly but nevertheless firm, in which he recalled a wandering advocate to the issues at hand.

Few men have ever been called upon to serve their country in such high offices and for such extended periods. None has ever served with more conscientious fidelity. As a lawyer, as a statesman and as a jurist, he labored

well and left behind him so splendid a record of achievement that his professional brethren who were privileged to witness its creation will always regard it as an inspiration to greater effort.

Wherefore, Be It Resolved, That we, the members of the Bar of the Supreme Court of the United States, express our sorrow that the long life of former Chief Justice Hughes has reached its end. We record our high appreciation of his great qualities of mind and heart, our full recognition of his many public services to his country and our deep gratitude for the lustre that he shed by his life and character upon the profession which he so adorned.

Be It Also Resolved, That the Attorney General be asked to present these resolutions to the Court and to request that they be permanently inscribed upon its record.

Mr. Attorney General McGrath addressed the Court as follows:

May it please the Court: Five times within the last forty years, within the personal experience of some now present here today, this Court has met to receive the Minute and Resolutions of its Bar to mark the passing of a Chief Justice of the United States.

Today your Honors meet to mourn Charles Evans Hughes, the eleventh Chief Justice, and to commemorate, in fitting and reverent fashion, his life and his judicial services.

This would be, in any event, a solemn occasion. But it is additionally marked with sadness by reason of the untimely death, since the meeting of the Bar of this Court in November last, of the late Chief Justice's only son, Charles Evans Hughes the younger, one time able Solicitor General of the United States.

The Minute and the Resolutions of the Bar which have been read, and the addresses which were made in November, outlined Chief Justice Hughes' career, at the bar, in public office, and on this bench. I shall not attempt

even to summarize what was there so eloquently and so gracefully said, and, since I did not have the privilege of acquaintance with the late Chief Justice, there are no personal touches which I could add to what was said by those who knew him. But I venture to think that it would not be inappropriate if I were to suggest, however briefly, an appraisal of those qualities which contributed to his eminence among those very eminent men who preceded him in the Chief Justiceship.

First of all, Charles Evans Hughes came to this Court the second time with a wide and varied experience in public life. He had been Governor of his State. He had been a candidate for President—and the nomination came to him unsought. He had been Secretary of State, directing the foreign relations of this country during the critical years that followed the end of the First World War. He had been counsel for investigatory bodies of his State legislature, and had conducted the wartime investigation of the aircraft industry. He had been for six years a Justice of this Court, and had been a member of the Permanent Court of International Justice as well. He was thus superbly equipped to preside over a tribunal which is, necessarily and inescapably, the final arbiter between the claims of the individual and those of government, as well as between the powers of the States and those of the Nation. It is precisely because the resolution of those fundamental questions involves judgments that are political in the larger sense that judges with first-hand experience in legislative and executive and administrative tasks have been in the forefront of those who have left a lasting impress on our constitutional law.

Second, Chief Justice Hughes was a consummate lawyer. As one of his associates has said, he "could tear the heart out of books because all his life he had been a student." With the exception of two years of law teaching as a young man, all of his life when not in public office was devoted to the practice—the very active practice—of the law. His handling of cases was characterized

by a complete mastery of the facts and of the law, and by powerful and persuasive advocacy. The same qualities characterized his opinions in this Court. A Hughes opinion stands up under the most searching analysis and after-scrutiny, and its style is, very literally, the man himself: well-organized, thoroughly logical, rolling onward in powerful sentences to an irresistible conclusion.

Finally, Chief Justice Hughes had the indispensable quality of integrity. A man of principles and quite without fear, he never chose the path that was merely easy. He knew that the greatest evils follow a compromise with or an appeasement of evil. And so he espoused and defended causes because of their merits wholly irrespective of public acclaim. Hughes' career throughout exemplifies what Mr. O'Brian has so well expressed, a "disdain for considerations of expediency."

When, therefore, some dozen or so years ago, the country was in the throes of a grave constitutional crisis, it was fortunate indeed, from whatever point of vantage that crisis is viewed, that Charles Evans Hughes was Chief Justice. I have no wish, least of all in this Chamber, to revive the emotions which it evoked, or even to recall the broad outlines of the struggle. But viewing the matter in retrospect, realizing that the conflict was either one that both sides would lose or that both sides would win, I think it both fair and accurate to say that to Chief Justice Hughes must go much of the credit for the ultimate outcome, which not only preserved our most cherished institutions but yet adapted them to the manifold needs of an increasingly complex society. Like the common law worthies of old, Hughes summed up the law, restated it, adapted it, and passed it on, making it serve the demands of the present, yet preserving its continuity with the past and its capacity for growth in the future. And, like Marshall, Hughes was ever mindful that "it is *a constitution* we are expounding" (4 Wheaton 407).

For Hughes himself the process involved very little back-tracking. He had written eloquent dissents in the

Railroad Retirement Act case (*Retirement Board* v. *Alton R. Co.*, 295 U. S. 330) and in the New York minimum wage case (*Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587); the views he expressed there did not later need to be changed. He had similarly, in the first Guffey Coal Act case (*Carter* v. *Carter Coal Co.*, 298 U. S. 238), set forth a basis for sustaining the statute which the majority struck down. Possibly his most questionable utterance, in the light of later decisions, was the commerce clause portion of his opinion in the Schecter case (*Schecter Corp.* v. *United States*, 295 U. S. 495); as to that, it is probably sufficient to say that no member of the Court expressed any contemporaneous disagreement with what was there said. And of course his views on civil liberties were consistently liberal, from the days of *Bailey* v. *Alabama* (219 U. S. 219) during his first service on the bench, through a whole series of land-mark cases, whose mere listing is a temptation which I must resist, though with regret, down to *Mitchell* v. *United States* (313 U. S. 80), decided in his last term of Court.

It would be tempting, too, to dwell upon Chief Justice Hughes' work as presiding officer of the Court, of his contribution to the formulation and promulgation of the Rules of Procedure, and of his relation to the functioning of the entire Federal judicial system through the Conference of Senior Circuit Judges and the Administrative Office of the United States Courts. But my time is fleeting, and I must leave untouched this and many other fields in which the late Chief Justice labored and left his mark.

Few men, in our or any other age, have packed so much and such superlative accomplishment into a single lifetime as did Charles Evans Hughes. Today, on this occasion, we are perhaps more immediately concerned with his accomplishments as Chief Justice. We know now—indeed, we knew during his lifetime—that he was a great Chief Justice. And as the years pass, as the immediate past recedes to a point where it can be viewed with more perspective, so that the constitutional problems of the

1930's can be examined with at least some of the detachment with which we examine those of, let us say, the 1850's, then, I venture to predict, the name of Charles Evans Hughes will be linked with those of Marshall and Taney on the list of the greatest expounders of our fundamental law.

May it please the Court: On behalf of the Bar of this Court, who in this matter speak for all the lawyers in the land, I move that the Minute and Resolutions heretofore presented in memory of Chief Justice Hughes be accepted, and that, together with the chronicle of these proceedings, they be spread upon the permanent records of this Court.

The Chief Justice said:

Mr. Attorney General: The Court receives the resolutions which you present in the confidence that they express the appreciation of his career which Chief Justice Hughes would most have welcomed. For he regarded "the esteem of his professional brethren" as "the highest reward that can come to a lawyer." And in such qualifications as you have mentioned, experience, ability and integrity, he recognized the only possible foundations for such esteem. The favorable judgment of one's fellows at the Bar, he said, is "commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty. . . . No manipulator or negotiator can secure it. It is essentially a tribute to a rugged independence of thought and intellectual honesty which shine forth amid the clouds of controversy. It is a tribute to exceptional power controlled by conscience and by a sense of public duty." Such a tribute, so fittingly recorded in the resolutions which have just been read, could hardly be more genuinely merited than by the attainments of position, character, and intellect achieved by Charles Evans Hughes.

When he took his seat as eleventh Chief Justice of the United States, Charles Evans Hughes was no stranger

to lofty judicial or executive post. The impressive list of public offices he held will bear another brief repetition. He had been a Judge of the Permanent Court of International Justice, a Member of the Permanent Court of Arbitration, and for six terms commencing in 1910, a member of this Court. In the executive branch of the national Government, he had been Secretary of State in two administrations, and the nominee of his Party for President. In his native New York, after spectacularly successful years as counsel to investigative committees, he was twice elected Governor. Each of these positions he fulfilled with unique distinction.

This career of public service, rare in the rich variety of its prizes, should not induce neglect of Chief Justice Hughes' achievements as a practicing member of the Bar. His law firm was quick to accord its recognition to him. At the time he began his public career, when he was in his early forties, he was in the topmost rank of the New York Bar. In his subsequent period of private practice, he of course enjoyed the prestige of the Governorship and Justiceship he had held. But the qualities of his intelligence and character were chiefly responsible for the vigor and breadth of his advocacy which won for him the acknowledged leadership of the American practicing Bar. Charles Evans Hughes was a great lawyer before he became a great judge.

What was the fusion of inner forces which produced such a man? The answer cannot be simple and may be put in an infinite variety of ways. In your remarks, Mr. Attorney General, and in the resolutions which have been read, some elements of that fusion have been eloquently expressed. To me, Chief Justice Hughes' primary attribute was balance, a perfect union of opposing tendencies. He was thinker and doer, scholar and politician. Absolute master he was of law, both law as written in the books and law as lived through functioning social institutions. His efficiency was superb, but it was tempered by a zealous humanitarianism.

His magnificent efficiency of thought and administration has been most emphasized. The reach of his intellectual and executive abilities was extensive, incisive, and profound. Best of all, it was subject to rigorous self-control. His superlative talents for receiving and retaining ideas, for analyzing and applying legal principles, gave ready obedience to the most drastic of self-imposed disciplines. But his mastery of self was not subservient to a narrowing approach nor an unchanging position. Always he was alert to recognize and utilize better tenets and techniques. He knew when to reform as well as when to preserve. His understanding encompassed the ultimate possibilities as well as the practical probabilities.

So obvious and manifold were his abilities that the spirit in which they were applied is sometimes slighted. Charles Evans Hughes was a humanitarian. He sought to mitigate suffering. The first modern workmen's compensation law was a product of his administration as Governor of New York. In that office, he strove to establish effective regulation of utilities, to expand direct popular participation in the governmental process and to enable the passage of child labor laws and kindred legislation; he took positions which were advanced outposts for his time. On this Court, Chief Justice Hughes authored opinions which are taken as symbolizing the constitutional acceptability of the efforts of state and federal government to cope with contemporary economic problems by exercising, respectively, the police and the commerce power. This view of the Constitution encounters far less vocal opposition today than it did when such decisions as the state minimum wage and National Labor Relations Board cases were handed down. Charles Evans Hughes was ready to soften the impact on the individual of the anything-goes economics which characterized the national expansion in his early years.

His concern for humanity was evident also in his leadership in the struggle for world peace. His years as Secretary of State and international jurist were marked

by unwavering devotion to peaceful settlements of dispute. His was the way of conference and negotiation, of neighborliness and disarmament, of law and order among nations.

Bullying he opposed at home as well as abroad. He was constantly solicitous of the liberties which the Constitution assures the individual. His opinions on this Court, as Associate Justice as well as Chief Justice, display an appreciation of and fealty to lofty ideals of fair trial, for ideas as well as individuals. His vigilance to protect individual freedom, to promote world peace and to approve public means for dealing with problems which apparently no longer could be solved by unaided or unregulated individual enterprise, stamp Charles Evans Hughes as intensely humanitarian.

Humane but efficient, Charles Evans Hughes manifests the balance which is especially worthy of emulation today. There is overmuch interest these days in classification at the expense of comprehension. There is excessive pressure to take all or none of a single dogma, rather than to accept the good and reject the evil of all proposals. In our times, there is extreme need of men like Charles Evans Hughes, who have some inner gyroscope of conscience and capacity which maintains a balanced devotion to duty. Chief Justice Hughes had his own exalted standards and principles, and he lived by them. In him there was no surrender to the purposes of the uncritical or the critique of a single viewpoint.

He described his conception of the judicial function in an address to some Federal judges. "A young man wrote me the other day," he related, "to ask whether I regarded myself as 'liberal' or 'conservative.' I answered that these labels do not interest me. I know of no accepted criterion. Some think opinions are conservative which others might regard as essentially liberal, and some opinions classed as liberal might be regarded from another point of view as decidedly illiberal. . . . A judge

who does his work in an objective spirit, as a judge should, will address himself conscientiously to each case, and will not trouble himself about labels."

The history of this Court reflects the objective spirit, the balance of Chief Justice Charles Evans Hughes. His view of the workings of the Court and the Federal judicial system was sufficiently detached to recognize the opportunity for improvement in administration. The Administrative Office Act of 1939 is a symbol of his concern for efficiency in the functioning of courts. The achievements of the Administrative Office of the United States Courts and the day-by-day operations of the Federal judiciary as a fully independent branch of our national Government are founded in large part upon the wisdom of Chief Justice Charles Evans Hughes.

The years of his service as Chief Justice were ones in which this Court was in the very forefront of public notice. Those years are fresh enough in memory so that recitation of the unusual position occupied by the Court is not needed. What does need to be recorded is that the Court emerged as it did in large measure because of the consummate skill of its Chief Justice. He was precise and decisive in playing the role he believed the Chief Justice ought to play. Everything he did manifested veneration for the traditions of this Court and the constitutional scheme of our Government, and vision to look forward to the adaptation of the Court and the other vehicles of our democracy to possible future needs. Surely Charles Evans Hughes will rank as one of the great Chief Justices.

More, there can even now, so few years after his death, be no doubt that Charles Evans Hughes deserves inclusion on the select roll of great Americans.

THE CHIEF JUSTICE directed that the resolutions be spread upon the minutes of the Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1948.

KIMBALL LAUNDRY CO. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 63. Argued December 7–8, 1948.—Decided June 27, 1949.

Under an Act authorizing condemnation proceedings to acquire property for military purposes, the United States, on November 21, 1942, petitioned the District Court to condemn the temporary use of a laundry, for a term ending June 30, 1943, subject to renewal annually. The Government took possession of the property on November 22, 1942, and the term was renewed annually until June 30, 1946. Meanwhile the laundry suspended service to its regular customers. As just compensation to the owner, a jury awarded an annual rental of $70,000 and $45,776.03 for damage to the plant and machinery beyond ordinary wear and tear. The District Court entered judgment on the verdict. Interest was allowed from November 22, 1942, on the amount due for the period ending June 30, 1943; from the beginning of each annual term on the amount due for that term; and from the date of the award on the amount of damage to the plant and machinery. No compensation was awarded for diminution in the value of the business due to the destruction of trade routes, a proffer of evidence thereof having been rejected. *Held:*

1. The award of compensation made for the temporary taking of the land, plant and equipment was correct. Pp. 6–8.

(a) The proper measure of compensation for the temporary taking was the rental that probably could have been obtained, not the difference between the market value of the fee on the date of the taking and its market value on the date of its return. Pp. 6–7.

(b) The award for damage to the plant and machinery beyond ordinary wear and tear was justified on the theory that such indemnity would be payable by an ordinary lessee, though not fixed in advance as part of his rent because not then ascertainable. P. 7.

(c) The amounts awarded by the jury as rental value of the physical property and as compensation for damage to the plant and equipment in excess of ordinary wear and tear were adequately supported by the evidence. Pp. 7–8.

2. The basis for the award of interest was appropriate. The Government was not liable for interest on the total amount of the award from the date of the taking. P. 21.

3. The Government having for all practical purposes preempted the trade routes for the period of its occupancy, it must pay compensation for whatever transferable value their temporary use may have had; and the case must be remanded to the District Court to determine what that value, if any, was. Pp. 8–21.

(a) When the Government has taken the temporary use of business property, it would be unfair to deny compensation for a demonstrable loss of going-concern value upon the assumption that an even more remote possibility—the temporary transfer of going-concern value—might have been realized. P. 15.

(b) In determining the compensable value of the temporary use of the trade routes, the District Court should consider any evidence which would have been likely to convince a potential purchaser as to the presence and amount of the laundry's going-concern value, including (by way of example and subject to certain cautions set forth in the opinion) the record of past earnings and expenditures for soliciting business. Pp. 16–21.

(c) If the District Court should find petitioner's evidence adequate to submit to the jury for a finding as to presence and amount of the value of the trade routes, it must instruct the jury as to computation of the compensation due, which must not exceed the value of their temporary control. Pp. 20–21.

166 F. 2d 856, reversed.

A judgment of the District Court, entered on the verdict of a jury in a condemnation proceeding, was affirmed by the Court of Appeals. 166 F. 2d 856. This Court granted certiorari. 335 U. S. 807. *Reversed and remanded*, p. 21.

William J. Hotz argued the cause for petitioner. With him on the brief were *William J. Hotz, Jr.* and *William F. Dalton.*

Assistant Solicitor General Washington argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *Wilma C. Martin.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On November 21, 1942, the United States filed a petition [1] in the United States District Court for the District of Nebraska, to condemn the plant of the Kimball Laundry Company in Omaha, Nebraska, for use by the Army for a term initially expiring June 30, 1943, and to be extended from year to year at the election of the Secretary of War. The District Court granted the United States immediate possession of the facilities of the company, except delivery equipment, for the requested period. The term was subsequently extended several times. The last year's extension was to end on June 30, 1946, but the property was finally returned on March 23, 1946.

The Kimball Laundry Company is a family corporation the principal stockholders of which are three brothers who are also its officers. The Laundry's business has been established for many years; its plant is large and well equipped with modern machinery. After the Army took over the plant, the Quartermaster Corps ran it as a laundry for personnel in the Seventh Service Command. Most of the Laundry's 180 employees were retained, and one of the brothers stayed on as operating manager. Having no other means of serving its customers, the Laundry suspended business for the duration of the Army's occupancy.

[1] The petition was filed under § 201 of Title II of the Second War Powers Act of 1942, 56 Stat. 176, 177, 50 U. S. C. App. § 632.

On November 19, 1943, a board of appraisers appointed by the District Court, in accordance with Nebraska law, reported that "the just compensation for the value of the use of the premises taken by the United States of America is the sum of $74,940.00 per annum . . . ." The appraisers made no award of damages for the loss of patrons, which they recognized to be probable, because at that time the amount of the loss could not be appraised. The Government and the Laundry both appealed the appraisers' award, and the question of just compensation was tried to a jury in March of 1946. The jury awarded an annual rental of $70,000—a total of $252,000 for the whole term—and $45,776.03 for damage to the plant and machinery beyond ordinary wear and tear. The rental award was intended to cover taxes, insurance, normal depreciation, and a return on the value of the Laundry's physical assets. Interest at the rate of 6 per cent was added from November 22, 1942, the day on which the Army took possession, on the amount due for the period between that date and June 30, 1943, and on the rental for each year thereafter from the beginning of the year until paid. Interest on the sum awarded for damage to the plant and machinery was adjudged to run from the date of the verdict, since the plant had not then been returned.

The Laundry appealed to the Court of Appeals for the Eighth Circuit, assigning numerous errors in the admission and exclusion of testimony and in the instructions to the jury. The Court of Appeals affirmed the District Court, 166 F. 2d 856, and we granted the Laundry's petition for certiorari, 335 U. S. 807, because it raised novel and serious questions in determining what is "just compensation" under the Fifth Amendment.

These questions are not resolved by the familiar formulas available for the conventional situations which gave occasion for their adoption. As Mr. Justice Bran-

deis observed, "Value is a word of many meanings." *Southwestern Bell Telephone Co.* v. *Public Service Comm'n,* 262 U. S. 276, 310. For purposes of the compensation due under the Fifth Amendment, of course, only that "value" need be considered which is attached to "property," [2] but that only approaches by one step the problem of definition. The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship. See *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 508–09. Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation. *McGovern* v. *New York,* 229 U. S. 363; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266.

The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent.

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[2] U. S. Const. Amend. V: ". . . nor shall private property be taken for public use, without just compensation."

But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place. If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the "market price" becomes so important a standard of reference.[3] But when the property is of a kind seldom exchanged, it has no "market price," and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights. Cf. *Old South Association* v. *Boston,* 212 Mass. 299, 99 N. E. 235. These considerations have special relevance where "property" is "taken" not in fee but for an indeterminate period.

Approaching thus the question of compensation for the temporary taking of petitioner's land, plant, and equipment, we believe that the award made by the District Court was correct. Petitioner insists, however, that the measure of compensation for a temporary taking

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[3] Once taken, of course, property can have no actual market value except as giving rise to a claim against the taker. See 1 Bonbright, The Valuation of Property 414 (1937). In view of the resulting necessity of postulating a hypothetical sale, care must be taken to avoid the extremes, on the one hand, of excluding the value of the property for special uses and, on the other, of supposing the hypothetical purchaser to have either the same idiosyncrasies as the owner (compare *L. R. Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, with *Producers' Wood Preserving Co.* v. *Commissioners of Sewerage,* 227 Ky. 159, 12 S. W. 2d 292) or the same opportunities for use of the property as a taker armed with the power of eminent domain (see e. g., *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53; *McGovern* v. *New York,* 229 U. S. 363; *Olson* v. *United States,* 292 U. S. 246; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266).

which should have been applied is the difference between the market value of the fee on the date of the taking and its market value on the date of its return. But it was known from the outset that this taking was to be temporary, and determination of the value of temporary occupancy can be approached only on the supposition that free bargaining between petitioner and a hypothetical lessee of that temporary interest would have taken place in the usual framework of such negotiations. We agree with both lower courts, therefore, that the proper measure of compensation is the rental that probably could have been obtained, and so this Court has held in the two recent cases dealing with temporary takings. *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motor Co.*, 327 U. S. 372. Indeed, if the difference between the market value of the fee on the date of taking and that on the date of return were taken to be the measure, there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy.

The courts below also awarded compensation to petitioner for damage to its machinery and equipment in excess of ordinary wear and tear, the award of rental having been adjusted to include an allowance for normal depreciation. The Government does not object to this award, but we think it appropriate to point out that we find it justified on the theory that such indemnity would be payable by an ordinary lessee, though not fixed in advance as part of his rent because not then capable of determination.

The petitioner makes numerous objections to the sufficiency of the evidence in support of the amounts fixed by the jury as the rental value of the physical property and as compensation for damage to the plant and equip-

ment in excess of ordinary wear and tear. Suffice it to say that we find these awards adequately supported.

At the core of petitioner's claim that it has been denied just compensation is the contention that there should have been included in the award to it some allowance for diminution in the value of its business due to the destruction of its "trade routes." The term "trade routes" serves as a general designation both for the lists of customers built up by solicitation over the years and for the continued hold of the Laundry upon their patronage.

At the trial petitioner offered to prove the value of the trade routes by testimony of an expert witness based on the gross receipts attributable to each class of customers, and the testimony of one of its officers was offered to show that this value had wholly disappeared during the three and one-half years of the Army's use of the plant.[4] It further offered to show the cost of building up the customer lists, which had not been capitalized but charged to expense, and losses which would be incurred after the resumption of operations while they were being rebuilt. The petitioner also attempted to introduce evidence of its gross and net income for the eighteen years preceding the taking, the amount of dividends paid, and the ratio of officers' salaries to capital stock and surplus, on the theory that this evidence would shed additional light on the value of the Laundry as a going business. The trial court rejected these offers as not bearing upon the "fair market value or fair use value of the property taken" and instructed the jury that it should not consider diminution in the value of the business. The Court of Appeals affirmed because, in its opinion, whatever may have been the loss in value of the business or the trade routes

[4] Although the theory upon which petitioner's various offers of proof were made was not always well defined, their import is clear enough to preclude rejecting them as meaningless.

brought about by the taking, "The Government did not take or intend to take, and obviously could not use, the Company's business, trade routes or customers." 166 F. 2d at 860.

The market value of land as a business site tends to be as high as the reasonably probable earnings of a business there situated would justify, and the value of specially adapted plant and machinery exceeds its value as scrap only on the assumption that it is income-producing. And income, in the case of a service industry, presupposes patronage. Since petitioner has been fully compensated for the value of its physical property, any separate value that its trade routes may have must therefore result from the contribution to the earning capacity of the business of greater skill in management and more effective solicitation of patronage than are commonly given to such a combination of land, plant, and equipment. The product of such contributions is an intangible which may be compendiously designated as "going-concern value," but this is a portmanteau phrase that needs unpacking.

Though compounded of many factors in addition to relations with customers, that element of going-concern value which is contributed by superior management may be transferable to the extent that it has a momentum likely to be felt even after a new owner and new management have succeeded to the business property. But because this momentum can be maintained only by the application of continued energy and skill, it would gradually spend itself if the effort and skill of the new management were not in its turn expended. See Paton, Advanced Accounting 427, 435 (1941). Only that exercise of managerial efficiency, however, which has contributed to the future profitability of the business will have a transferable momentum that may give it value to a potential purchaser; that which has had only the effect of increasing current income or reducing expenses of operation has spent

itself from year to year. The value contributed by the expenditure of money in soliciting patronage, although likewise of limited duration, differs from managerial efficiency in that it derives not merely from the contribution of personal qualities but from original investment or the plowing back of income. As such it may sometimes be more readily recognized as an asset of the business.[5] It is clear, at any rate, that the value of both these elements, in combination, must be regarded as identical with the value alleged to inhere in the trade routes.

Assuming, then, that petitioner's business may have going-concern value as defined above, the question arises whether the intangible character of such value alone precludes compensation for it. The answer is not far to seek. The value of all property, as we have already observed, is dependent upon and inseparable from individual needs and attitudes, and these, obviously, are intangible. As fixed by the market, value is no more than a summary expression of forecasts that the needs and attitudes which made up demand in the past will have their counterparts in the future. See *Ithaca Trust Co.* v. *United States,* 279 U. S. 151, 155; cf. 1 Bonbright, The Valuation of Property 222 (1937). The only distinction to be made, therefore, between the attitudes which generate going-concern value and those of which tangible property is compounded is as to the tenacity of the past's hold upon the future: in the case of the latter a forecast of future demand can usually be made with greater certainty, for it is more probable on the whole that people will continue to want particular goods or services than that they will continue to look to a particular supplier of them. It is more likely, in other words, that people will persist in wanting to have their laundry done than that

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[5] Indeed, for tax purposes the Treasury may insist that such "deferred charges" be capitalized. See note 11, *post.*

they will keep on sending it to a particular laundry. But as the probability of continued patronage gains strength, this distinction becomes obliterated, and the intangible acquires a value to a potential purchaser no different from the value of the business' physical property. Since the Fifth Amendment requires compensation for the latter, the former, if shown to be present and to have been "taken," should also be compensable. As Mr. Justice Brandeis observed for the Court in *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388, 396, "In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances." See also *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 165; *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 414.

What, then, are the circumstances under which the Fifth Amendment requires compensation for such an intangible? Not, indeed, those of the usual taking of fee title to business property, but the denial of compensation in such circumstances rests on a very concrete justification: the going-concern value has not been taken. Such are all the cases, most of them decided by State courts under constitutions with provisions comparable to the Fifth Amendment, in which only the physical property has been condemned, leaving the owner free to move his business to a new location. E. g., *Bothwell* v. *United States,* 254 U. S. 231; *Banner Milling Co.* v. *State of New York,* 240 N. Y. 533, 148 N. E. 668. In such a situation there is no more reason for a taker to pay for the business' going-concern value than there would be for a purchaser to pay for it who had not secured from his vendor a covenant to refrain from entering into competition with him. It is true that there may

be loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will, and that such loss, like the cost of moving, is denied compensation as consequential. See *Joslin Mfg. Co.* v. *Providence,* 262 U. S. 668, 676. But such value as the good will retains, the owner keeps, and the remainder dissipated by removal would not contribute to the value paid for by a transferee of the vacated premises, except perhaps to the extent that the prospect of its loss would induce the owner to hold out for a higher price for his land and building. Cf. *United States* v. *General Motors Corp.,* 323 U. S. 373, 383. When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. See *Sawyer* v. *Commonwealth,* 182 Mass. 245, 65 N. E. 52, per Holmes, C. J. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. *Mitchell* v. *United States,* 267 U. S. 341.

The situation is otherwise, however, when the Government has condemned business property with the intention of carrying on the business, as where public-utility property has been taken over for continued operation by a governmental authority. If, in such a case, the taker acquires going-concern value, it must pay for it. *Omaha* v. *Omaha Water Co.,* 218 U. S. 180; see *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 191; Orgel, Valuation under The Law of Eminent Domain § 214 (1936), and cases there cited. Since a utility cannot ordinarily be operated profitably except as a monopoly, investment by the former owner of the utility in duplicating the con-

demned facilities could have no prospect of a profitable return. The taker has thus in effect assured itself of freedom from the former owner's competition. The owner retains nothing of the going-concern value that it formerly possessed; so far as control of that value is concerned, the taker fully occupies the owner's shoes.

But the public-utility cases plainly cannot be explained by the fact that the taker received the benefit of the utility's going-concern value. If benefit to the taker were made the measure of compensation, it would be difficult to justify higher compensation for farm land taken as a firing range than for swamp or sandy waste equally suited to the purpose. But see *Mitchell* v. *United States,* 267 U. S. 341, 344–45. It would be equally difficult to deny compensation for value to the taker in excess of value to the owner. But compare, e. g., *McGovern* v. *New York,* 229 U. S. 363; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266. The rationale of the public-utility cases, as opposed to those in which circumstances have brought about a diminution of going-concern value although the owner remained free to transfer it, must therefore be that an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable "taking" of property. See *United States* v. *General Motors Corp.,* 323 U. S. 373, 378; cf. *United States* v. *Causby,* 328 U. S. 256. If such a deprivation has occurred, the going-concern value of the business is at the Government's disposal whether or not it chooses to avail itself of it. Since what the owner had has transferable value, the situation is apt for the oft-quoted remark of Mr. Justice Holmes, "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195.

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We think that the situation before us comes within this principle. The Government's temporary taking of the Laundry's premises could no more completely have appropriated the Laundry's opportunity to profit from its trade routes than if it had secured a promise from the Laundry that it would not for the duration of the Government's occupancy of the premises undertake to operate a laundry business anywhere else in the City of Omaha. The taking was from year to year; in the meantime the Laundry's investment remained bound up in the reversion of the property. Even if funds for the inauguration of a new business were obtainable otherwise than by the sale or liquidation of the old one, the Laundry would have been faced with the imminent prospect of finding itself with two laundry plants on its hands, both of which could hardly have been operated at a profit. There was nothing it could do, therefore, but wait. Besides, though trade routes may be capable of transfer independently of the physical property with which they have been associated, it is wholly beyond the realm of conjecture that they could have been sold from year to year or that the Laundry would have bound itself to give them up for a longer period when at any time its plant might be returned. It is equally farfetched, moreover, to suppose that they could have been transferred for a limited period and then recaptured.

It is arguable, to be sure, that since an equally suitable plant might conceivably have been available to the petitioner at reasonable terms for the same period as the Government's occupancy of its own plant, and since that would have enabled it to stay in business without loss of going-concern value, it is irrelevant that no such premises happened to be available, as it would have been irrelevant, under a strict application of *Mitchell* v. *United States,* 267 U. S. 341, had the Government taken the fee. When fee title to business property has been taken, how-

ever, it is fair on the whole that the amount of compensation payable should not include speculative losses consequent upon realization of the remote possibility that the owner will be unable to find a wholly suitable location for the transfer of going-concern value. But when the Government has taken the temporary use of such property, it would be unfair to deny compensation for a demonstrable loss of going-concern value upon the assumption that an even more remote possibility—the temporary transfer of going-concern value—might have been realized. The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result. Compare *United States* v. *General Motors Corp.*, 323 U. S. 373, with *United States* v. *Petty Motor Co.*, 327 U. S. 372.[6]

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[6] The line drawn in these two cases between inclusion of removal costs in compensation for a temporary taking of less than a lessee's full term and their exclusion where the whole term has been taken is likewise based on a recognition of a difference in the degree of restriction of the condemnee's opportunity to adjust himself to the taking. In *United States* v. *General Motors Corp.*, 323 U. S. at 382, the Court, comparing a temporary with a fee taking, observed: "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates." In *United States* v. *Petty Motor Co.*, 327 U. S. at 379, the Court said: "There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in

We conclude, therefore, that since the Government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had. The case must accordingly be remanded to the District Court to determine what that value, if any, was. In making that determination, the Court should consider any evidence which would have been likely to convince a potential purchaser as to the presence and amount of petitioner's going-concern value, for this, as we have pointed out, must be considered identical with the value alleged to inhere in the trade routes. Though we do not mean to foreclose the consideration of other types of evidence or the application of other techniques of appraisal, it may shed some light on the problem to indicate as briefly as possible the relevance of the evidence rejected at the trial to the determination of the presence and amount of this value.

One index of going-concern value offered by petitioner is the record of its past earnings. If they should be found to have been unusually high in proportion to investment in its physical property, that might have been a persuasive indication to an informed purchaser of the business that more than tangible factors were at work.[7]

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the *General Motors* decision. Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal."

[7] The Government argues that if petitioner's testimony as to the value of its physical property were accepted, it could have no going-concern value because its average net earnings for the five years preceding the taking were too low to establish any excess return. The alleged value was about $650,000, and the average annual earnings $39,375.39, a return on that value of about 6%. On the other hand, the Government's own expert witnesses respectively valued the physical property, after allowing depreciation, at $455,000 and $433,500, and on that basis the rate of return would be about 9%. It is not for

Such a purchaser might well have measured the value thus contributed by capitalizing, at a rate taking into account the element of risk [8] and the number of years during which these factors would probably have effect, the excess of the probable future return upon investment in the business over a return which would be adequate compensation for the risk of investment in it.[9] If the figure chosen as representing investment were

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us, at any rate, to assume that 6% rather than 5% or some lower figure is the lowest that would compensate investment in the physical property.

[8] The importance of varying in accordance with varying risks the percentage at which income is capitalized to obtain business value has been emphasized by the Securities and Exchange Commission in computing value for purposes of § 77 B reorganizations. See Note, 55 Harv. L. Rev. 125, 133 (1941). See also Fisher, The Nature of Capital and Income, c. 16, "The Risk Element" (1906); Angell, Valuation Problems 14 (Practicing Law Institute, 1945).

[9] See Yang, Goodwill and Other Intangibles, cc. 5, 6 (1927); Simpson, *Goodwill* in 6 Encyc. Soc. Sci. 698, 699 (1931). For a systematic discussion of the steps involved in making such an estimate, see Accountants' Handbook 869 *et seq.* (Paton ed., 1944). It would be theoretically possible, of course, to arrive at the total value of the business not by adding going-concern value obtained by capitalization of excess income to a valuation of the physical property obtained in some other way, but by capitalization of all income. See 1 Bonbright, The Valuation of Property, cc. 11, 12; (1937); 1 Dewing, Financial Policy of Corporations, Bk. II, c. 1 (4th ed., 1941); cf. *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, 525–26; *Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523, 540–42. But a forecast of future earnings is subject to inaccuracy resulting both from the difficulty of discounting the nonrecurrent circumstances which entered into the record of past earnings upon which the forecast is based (even if no projection of future earnings is expressly made, past earnings can be used as a basis of capitalization only on the assumption that they will continue) and the hazards of any prediction of future conditions of business. See May, *A Footnote on Value,* 72 J. of Accountancy 225 (1941); Orgel, Valuation under The Law of Eminent Domain § 216 (1936). The consequences of inaccuracy are reduced by confining the capitalization to excess income, but of course it is a question of fact whether

cost, however, the possibility would probably have been recognized that the capitalized value of the excess income might involve duplication of value already reflected in the valuation of the site.[10]

In addition to or as a substitute for net income as an index of going-concern value, a purchaser might have been influenced by such evidence of expenditure upon building up the business as petitioner's records of payments to deliverymen for the solicitation of new customers. Instead of beginning with excess earnings resulting in part from expenditure on solicitation and then capitalizing them to reach going-concern value, such expenditure can be regarded as a direct contribution, in proportion to the amount of its long-term effectiveness, to the capital assets of the business. But the legitimacy of the inference that expenditures for the purpose of soliciting business have resulted in a value which will continue to contribute to the earning capacity of the business in later years and which is therefore a value that a purchaser might pay for, necessarily depends on the character of the business and the experience of those who are familiar with it.[11] This, at any rate, is a matter which is open to proof.

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future excess income can be predicted with certainty sufficient to persuade a purchaser of the business to pay for its capitalized value. See pp. 19–20, *post*.

[10] This possibility would arise wherever cost of the physical property, because the neighborhood was undeveloped at the time the business site was acquired or for some other reason, did not wholly reflect enhancement in its market value by the advantages of its location, since these advantages would increase total income. Such duplication could be avoided, however, by using as the measure of investment not cost but market value.

[11] In the case of a business like the laundry business which must entice patrons from already established competitors in an area confined by the range of delivery service, it may be that expenditure upon solicitation is regarded as a capital expenditure for part of a combination of income-producing assets quite as much as invest-

Though not capitalized and carried on the books, it is obvious that such an asset may be present even in a business losing money or at any rate not making enough to have any "excess" income. A relevant measure of its value, however, would be the gross income of the business, as is recognized by the method of estimating going-concern value that has been employed in cases dealing with the excess-profits tax base of laundry businesses. See *Metropolitan Laundry Co.*, 2 B. T. A. 1062; *Pioneer Laundry Co.*, 5 B. T. A. 821. Petitioner offered proof of the value of its trade routes based on just such a method and further offered to show that it was a method generally used in the laundry business. If so, it would also be relevant.[12]

But even though evidence in one or more of these categories may tend to establish the value of petitioner's

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ment in the land and building. Compare *Houston Natural Gas Corp.* v. *Commissioner,* 90 F. 2d 814 (C. A. 4th Cir.), holding the salaries and expenses of solicitors of new customers for a public utility to be a capital expenditure nondeductible from current income because contributing to income in future years. The Tax Court, its predecessor, the Board of Tax Appeals, and the Courts of Appeals have frequently held such analogous expenditures as those made to increase the circulation of newspapers and for certain forms of advertising to be capital expenditures. For collections of such cases, see 4 Mertens, Law of Federal Income Taxation § 25.18 and § 25.27 (1942). See also Dodd and Baker, Cases and Materials on Business Associations 1125–26 (1940). Compare the materials on valuation of good will as part of a decedent's gross estate collected in 2 Paul, Federal Estate and Gift Taxation § 18.16 (1942), and Paul, Federal Estate and Gift Taxation § 18.16 (1946 Supplement).

[12] Proceeding from the assumption that laundry businesses are a class having uniform characteristics, this method presupposes informed opinion both as to the normal ratio of a given volume of expenditure on solicitation to a given volume of gross income and as to the normal duration of the contribution to gross of a given amount of such expenditure. The Board of Tax Appeals cases cited as well as petitioner's offer of proof involved the further refinement that the ratios chosen varied with the gross income attributable to each class of customers.

trade routes, the consequence of its inadequacy may require complete denial of compensation where that would not be the result in the case of its tangible property. The reason is this: evidence which is needed only to fix the amount of the value of the tangible property is required to establish the very existence of an intangible value as well as its amount. Since land and buildings are assumed to have some transferable value, when a claimant for just compensation for their taking proves that he was their owner, that proof is *ipso facto* proof that he is entitled to some compensation. The claimant of compensation for an intangible, on the other hand, who cannot demonstrate a value that a purchaser would pay for has failed to sustain his burden of proving that he is entitled to any compensation whatever. This is a burden, moreover, which must be sustained by solid evidence; only thus can the probability of future demand be shown to approximate that for tangible property. Particularly is this true where these issues are to be left for jury determination, for juries should not be given sophistical and abstruse formulas as the basis for their findings nor be left to apply even sensible formulas to factors that are too elusive.

If the District Court, bearing in mind these cautions, should find petitioner's evidence adequate to submit to the jury for a finding as to the presence and amount of the value of the trade routes, it will then be necessary also to instruct it as to computation of the compensation due. Consistently with an approach which seeks with the aid of all relevant data to find an amount representing value to any normally situated owner or purchaser of the interests taken, no value greater than the value of their temporary control would be compensable. Since, as we have noted, value of this sort can have only a limited duration, the value of the trade routes for the period of the Army's occupancy of the physical property might be estimated by computing the discounted

value as of the beginning of the period of the net contribution likely to have been made to the business during that period had it been carried on; its value for each year would be the net contribution for that year.[13] But here, as hitherto, we mean only to illustrate and not to prescribe the course which may be taken upon remand of the case.

Petitioner also protests against the basis chosen by the lower courts for the award of interest. It argues that the Government, having taken the whole property on November 21, 1942, should pay interest from that day on the total amount of the award. We have already rejected, however, the only possible theory upon which this claim could rest—that the proper method of computing the award is to determine the difference between the value of the business on the date of taking and its value on the date of return. It follows from our holding that the proper measure of compensation was an annual rental which came due only at the beginning of each renewal of the Army's occupancy, that interest should be payable on each installment of rental only from that date.

For proceedings not inconsistent with this opinion, the case is

Reversed and remanded.

MR. JUSTICE RUTLEDGE, concurring.

As I understand the opinion of the Court, its effect is simply to recognize that short-term takings of property entail considerations not present where complete title has

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[13] That contribution would not of course continue from year to year in a straight line, though it may prove more convenient to treat it as if it did. The analysis of compound-interest methods of depreciation accounting in Paton, Advanced Accounting, c. 12 (1941), gives insight into ways in which the rate of decline in the value of such an intangible might be computed. See also *id.* at 435; Canning, The Economics of Accountancy, cc. 13, 14 (1929); Yang, Goodwill and Other Intangibles, 201 *et seq.* (1927).

been taken. Rules developed for the simple situation in which all the owner's interests in the property have been irrevocably severed should not be forced to fit the more complex consequences of a piecemeal taking of successive short-term interests. Such takings may involve compensable elements that in the nature of things are not present where the whole is taken.

With this much I agree. But having recognized the possible compensability of intangible interests, I would not subscribe to a formulation of theoretical rules defining their nature or prescribing their measurement. What seems theoretically sound may prove unworkable for judicial administration. But I do not understand the opinion of the Court to do more than indicate possible approaches to the compensation of such interests. Since remand of the case will permit the empirical testing of these approaches, I join in the Court's opinion.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE REED concur, dissenting.

The United States took this plant in order to run a laundry for the Army, not for the public. The trade-routes were wholly useless to it. It never used them. Yet it is forced to pay for them under a new constitutional doctrine that is forged for this case.

Heretofore it was settled that the owner could not receive compensation under the Fifth Amendment for the destruction of a business which resulted from the taking of his physical property, even though the business could not be reestablished elsewhere. *Mitchell* v. *United States,* 267 U. S. 341; *Bothwell* v. *United States,* 254 U. S. 231. That result followed from the rule that consequential damages resulting from the taking were not compensable. See *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–283; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377–378.

And so in this case if the United States had taken this plant for a *permanent* laundry to run for the Army and not for the public[1] it need not pay for the trade-routes. As Justice Brandeis said in *Mitchell* v. *United States, supra,* p. 345, "If the business was destroyed, the destruction was an unintended incident of the taking of land." As much seems to be conceded by the Court in the present case. That concession is necessary if precedent is to control. For in *United States* v. *General Motors,* 323 U. S. 373, 383, we said that a *temporary* taking and a *permanent* taking were to be treated alike in that respect. In that case the cost of moving out and preparing the space for the new occupancy was allowed insofar as it bore on the market value of the temporary occupancy. But we ruled that "proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent" must in that case "as in the case of the condemnation of a fee," be excluded from the reckoning, p. 383. The Court today repudiates that ruling when it holds that the United States must pay for the trade-routes of petitioner when its taking of the laundry was only *temporary.* There would be a complete destruction of the trade-routes if the taking of the plant were *permanent* and a depreciation of them (I assume) where it is *temporary.* Why the latter is compensable when the former is not is a mystery. Even the academic dissertation on valuation which the opinion imports into the Fifth Amendment from accounting literature conceals the answer.

The truth of the matter is that the United States is being forced to pay not for what it gets but for what the owner loses. The value of trade-routes represents the patronage of the customers of the laundry. Petitioner,

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[1] As respects payment for the going-concern value when the government takes over a business to run it as such, see *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202–203.

I assume, lost some of them as a result of the government's temporary taking of the laundry. But the government did not take them. There was indeed no possible way in which it could have used them. Hence the doctrine that makes the United States pay for them is new and startling. It promises swollen awards which Congress in its generosity might permit but which it has never been assumed the Constitution compels.

Petitioner has received all that it is entitled to under the Constitution. It has obtained after three years and seven months of use of its plant by the United States a sum of money equal to almost half the market value of the fee. That award was based on the market rental value of the plant [2] plus an allowance to restore the property to its original condition.[3] Under the authorities that award cannot be increased unless we are to sit as a Committee on Claims of the Congress and award consequential damages.

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[2] That is the measure of compensation for the taking of a temporary interest in property. *United States* v. *General Motors Corp.*, 323 U. S. 373, 382; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378.

[3] Compensation for ordinary wear and tear is included in fixing the market rental value of the property. But wear and tear above that amount is separately compensable. See *In re Condemnation of Lands*, 250 F. 314, 315; *United States* v. *Certain Parcels of Land*, 55 F. Supp. 257, 263; *United States* v. *5,901.77 Acres of Land*, 65 F. Supp. 454; *United States* v. *14.4756 Acres of Land*, 71 F. Supp. 1005.

WOLF *v.* COLORADO.

CERTIORARI TO THE SUPREME COURT OF COLORADO.

Nos. 17 and 18. Argued October 19, 1948.—Decided June 27, 1949.

In a prosecution in a state court for a state crime, the Fourteenth Amendment of the Federal Constitution does not forbid the admission of relevant evidence even though obtained by an unreasonable search and seizure. Pp. 25–33.

(a) Arbitrary intrusion into privacy by the police is prohibited by the Due Process Clause of the Fourteenth Amendment. Pp. 27–28.

(b) While the doctrine of *Weeks* v. *United States,* 232 U. S. 383, making evidence secured in violation of the Fourth Amendment inadmissible in federal courts is adhered to, it is not imposed on the States by the Fourteenth Amendment. Pp. 28–33.

117 Colo. 279, 321, 187 P. 2d 926, 928, affirmed.

Judgments of conviction in two criminal prosecutions in a state court were sustained by the State Supreme Court against claims of denial of rights under the Federal Constitution. 117 Colo. 279, 321, 187 P. 2d 926, 928. This Court granted certiorari. 333 U. S. 879. *Affirmed,* p. 33.

Philip Hornbein argued the cause for petitioner. With him on the brief were *Philip Hornbein, Jr.* and *Donald M. Shere.*

James S. Henderson, Assistant Attorney General of Colorado, argued the cause for respondent. With him on the brief was *H. Lawrence Hinkley,* Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The precise question for consideration is this: Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted

at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks* v. *United States,* 232 U. S. 383? The Supreme Court of Colorado has sustained convictions in which such evidence was admitted, 117 Col. 279, 187 P. 2d 926; 117 Col. 321, 187 P. 2d 928, and we brought the cases here. 333 U. S. 879.

Unlike the specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII) upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, e. g., *Hurtado* v. *California,* 110 U. S. 516; *Twining* v. *New Jersey,* 211 U. S. 78; *Brown* v. *Mississippi,* 297 U. S. 278; *Palko* v. *Connecticut,* 302 U. S. 319. Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. *Adamson* v. *California,* 332 U. S. 46. The issue is closed.

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in *Palko* v. *Connecticut, supra,* 302 U. S. 319. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead. In rejecting the suggestion that the Due Process Clause incorporated the original Bill of Rights, Mr. Justice Cardozo reaffirmed on behalf of that

Court a different but deeper and more pervasive conception of the Due Process Clause. This Clause exacts from the States for the lowliest and the most outcast all that is "implicit in the concept of ordered liberty." 302 U. S. at 325.

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion." *Davidson* v. *New Orleans*, 96 U. S. 97, 104. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since *Davidson* v. *New Orleans* was decided.

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process

Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

In *Weeks* v. *United States, supra,* this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right

of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.

I. Before the *Weeks* decision 27 States had passed on the admissibility of evidence obtained by unlawful search and seizure.
   (a) Of these, 26 States opposed the *Weeks* doctrine. (See Appendix, Table A.)
   (b) Of these, 1 State anticipated the *Weeks* doctrine. (Table B.)

II. Since the *Weeks* decision 47 States all told have passed on the *Weeks* doctrine. (Table C.)
   (a) Of these, 20 passed on it for the first time.
      (1) Of the foregoing States, 6 followed the *Weeks* doctrine. (Table D.)
      (2) Of the foregoing States, 14 rejected the *Weeks* doctrine. (Table E.)
   (b) Of these, 26 States reviewed prior decisions contrary to the *Weeks* doctrine.
      (1) Of these, 10 States have followed *Weeks,* overruling or distinguishing their prior decisions. (Table F.)
      (2) Of these, 16 States adhered to their prior decisions against *Weeks.* (Table G.)
   (c) Of these, 1 State repudiated its prior formulation of the *Weeks* doctrine. (Table H.)

III. As of today 31 States reject the *Weeks* doctrine, 16 States are in agreement with it. (Table I.)

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IV. Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible. (Table J.)

The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection.[1] Indeed, the exclusion of evidence

[1] The common law provides actions for damages against the searching officer, e. g., *Entick* v. *Carrington*, 2 Wils. 275, 19 How. St. Tr. 1029; *Grumon* v. *Raymond*, 1 Conn. 40; *Sandford* v. *Nichols*, 13 Mass. 286; *Halsted* v. *Brice*, 13 Mo. 171; *Hussey* v. *Davis*, 58 N. H. 317; *Reed* v. *Lucas*, 42 Texas 529; against one who procures the issuance of a warrant maliciously and without probable cause, e. g., *Gulsby* v. *Louisville & N. R. Co.*, 167 Ala. 122, 52 So. 392; *Whitson* v. *May*, 71 Ind. 269; *Krehbiel* v. *Henkle*, 152 Iowa 604, 129 N. W. 945; *Olson* v. *Tvete*, 46 Minn. 225, 48 N. W. 914; *Boeger* v. *Langenberg*, 97 Mo. 390, 11 S. W. 223; *Doane* v. *Anderson*, 60 Hun 586, 15 N. Y. S. 459; *Shall* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 156 Wis. 195, 145 N. W. 649; against a magistrate who has acted without jurisdiction in issuing a warrant, e. g., *Williams* v. *Kozak*, 280 F. 373 (C. A. 4th Cir.); *Grumon* v. *Raymond*, 1 Conn. 40; *Kennedy* v. *Terrill*, Hardin (Ky.) 490; *Shaw* v. *Moon*, 117 Ore. 558, 245 P. 318; and against persons assisting in the execution of an illegal search, e. g., *Hebrew* v. *Pulis*, 73 N. J. L. 621, 625, 64 A. 121, 122; *Cartwright* v. *Canode*, 138 S. W. 792 (Tex. Civ. App.), aff'd, 106 Texas 502, 171 S. W. 696. One may also without liability use force to resist an unlawful search. E. g., *Commonwealth* v. *Martin*, 105 Mass. 178; *State* v. *Mann*, 27 N. C. 45.

Statutory sanctions in the main provide for the punishment of one maliciously procuring a search warrant or willfully exceeding his authority in exercising it. *E. g.*, 18 U. S. C. (1946 ed.) §§ 630, 631; Ala. Code, Tit. 15, § 99 (1940); Ariz. Code Ann. § 44–3513 (1939); Fla. Stat. Ann. §§ 933.16, 933.17 (1944); Iowa Code §§ 751.38, 751.39 (1946); Mont. Rev. Code Ann. §§ 10948, 10952 (1935); Nev. Comp. Laws §§ 10425, 10426 (1929); N. Y. Crim. Code §§ 811, 812, N. Y. Penal Law §§ 1786, 1847; N. D. Rev. Code §§ 12–1707, 12–1708 (1943); Okla. Stat. Ann., Tit. 21, §§ 536, 585, Tit. 22, §§ 1239, 1240 (1937); Ore. Comp. Laws Ann. § 26–1717 (1940); S. D. Code §§ 13.1213, 13.1234, 34.9904, 34.9905 (1939); Tenn. Code Ann. § 11905 (1934). Some statutes more broadly penalize unlawful searches.

is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. Weighty testimony against such an insistence on our own view is furnished by the opinion of Mr. Justice (then Judge) Cardozo in *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585.[2] We cannot brush aside the experience of States which deem the incidence of such

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E. g., 18 U. S. C. (1946 ed.) § 53a; Idaho Code Ann. §§ 17–1004, 17–1024 (1932); Minn. Stat. §§ 613.54, 621.17 (1945); Va. Code Ann. § 4822d (Michie, 1942); Wash. Rev. Stat. Ann. §§ 2240–1, 2240–2. Virginia also makes punishable one who issues a general search warrant or a warrant unsupported by affidavit. Va. Code Ann. § 4822e (Michie, 1942). A few States have provided statutory civil remedies. See, *e. g.,* Ga. Code Ann. § 27–301 (1935); Ill. Rev. Stat., c. 38, § 698 (Smith-Hurd, 1935); Miss. Code Ann. § 1592 (1942). And in one State, misuse of a search warrant may be an abuse of process punishable as contempt of court. See Mich. Stat. Ann. § 27.511 (1938).

[2] "We hold, then, with the defendant that the evidence against him was the outcome of a trespass. The officer might have been resisted, or sued for damages, or even prosecuted for oppression (Penal Law, §§ 1846, 1847). He was subject to removal or other discipline at the hands of his superiors. These consequences are undisputed. The defendant would add another. We must determine whether evidence of criminality, procured by an act of trespass, is to be rejected as incompetent for the misconduct of the trespasser. . . .

"Those judgments [*Weeks* v. *United States* and cases which followed it] do not bind us, for they construe provisions of the Federal

conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon

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Constitution, the Fourth and Fifth Amendments, not applicable to the States. Even though not binding, they merit our attentive scrutiny. . . .

"In so holding [*i. e.*, that evidence procured by unlawful search is not incompetent], we are not unmindful of the argument that unless the evidence is excluded, the statute becomes a form and its protection an illusion. This has a strange sound when the immunity is viewed in the light of its origin and history. The rule now embodied in the statute was received into English law as the outcome of the prosecution of Wilkes and Entick . . . . Wilkes sued the messengers who had ransacked his papers, and recovered a verdict of £4,000 against one and £1,000 against the other. Entick, too, had a substantial verdict . . . . We do not know whether the public, represented by its juries, is to-day more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy. Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams* case [176 N. Y. 351, 68 N. E. 636] strikes a balance between opposing interests." 242 N. Y. at 19, 20, 24–25, 150 N. E. at 586–87, 587, 588–89.

remote authority pervasively exerted throughout the country.

We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under § 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the *Weeks* doctrine binding upon the States.

Affirmed.

APPENDIX.*

Table A.

STATES WHICH OPPOSED THE *Weeks* DOCTRINE BEFORE THE *Weeks* CASE HAD BEEN DECIDED.

Ala.	*Shields* v. *State*, 104 Ala. 35, 16 So. 85.
Ark.	*Starchman* v. *State*, 62 Ark. 538, 36 S. W. 940.
Conn.	*State* v. *Griswold*, 67 Conn. 290, 34 A. 1046.
Ga.	*Williams* v. *State*, 100 Ga. 511, 28 S. E. 624.
Idaho	*State* v. *Bond*, 12 Idaho 424, 439, 86 P. 43, 47.
Ill.	*Siebert* v. *People*, 143 Ill. 571, 583, 32 N. E. 431, 434.
Kan.	*State* v. *Miller*, 63 Kan. 62, 64 P. 1033.
Me.	See *State* v. *Gorham*, 65 Me. 270, 272.
Md.	*Lawrence* v. *State*, 103 Md. 17, 35, 63 A. 96, 103.

*In the case of jurisdictions which have decided more than one case in point, the following Tables cite only the leading case.

Table A—Continued.

STATES WHICH OPPOSED THE *Weeks* DOCTRINE BEFORE THE *Weeks* CASE HAD BEEN DECIDED.

Mass.	*Commonwealth* v. *Dana*, 2 Metc. 329.
Mich.	*People* v. *Aldorfer*, 164 Mich. 676, 130 N. W. 351.
Minn.	*State* v. *Strait*, 94 Minn. 384, 102 N. W. 913.
Mo.	*State* v. *Pomeroy*, 130 Mo. 489, 32 S. W. 1002.
Mont.	See *State* v. *Fuller*, 34 Mont. 12, 19, 85 P. 369, 373.
Neb.	*Geiger* v. *State*, 6 Neb. 545.
N. H.	*State* v. *Flynn*, 36 N. H. 64.
N. Y.	*People* v. *Adams*, 176 N. Y. 351, 68 N. E. 636.
N. C.	*State* v. *Wallace*, 162 N. C. 622, 78 S. E. 1.
Okla.	*Silva* v. *State*, 6 Okla. Cr. 97, 116 P. 199.
Ore.	*State* v. *McDaniel*, 39 Ore. 161, 169–70, 65 P. 520, 523.
S. C.	*State* v. *Atkinson*, 40 S. C. 363, 371, 18 S. E. 1021, 1024.
S. D.	*State* v. *Madison*, 23 S. D. 584, 591, 122 N. W. 647, 650.
Tenn.	*Cohn* v. *State*, 120 Tenn. 61, 109 S. W. 1149.
Vt.	*State* v. *Mathers*, 64 Vt. 101, 23 A. 590.
Wash.	*State* v. *Royce*, 38 Wash. 111, 80 P. 268.
W. Va.	See *State* v. *Edwards*, 51 W. Va. 220, 229, 41 S. E. 429, 432–33.

Table B.

STATE WHICH HAD FORMULATED THE *Weeks* DOCTRINE BEFORE THE *Weeks* DECISION.

Iowa	*State* v. *Sheridan*, 121 Iowa 164, 96 N. W. 730.

Table C.

STATES WHICH HAVE PASSED ON THE *Weeks* DOCTRINE SINCE THE *Weeks* CASE WAS DECIDED.

Every State except Rhode Island. But see *State* v. *Lorenzo*, 72 R. I. 175, 48 A. 2d 407 (holding that defendant had consented to the search, but that, even if he had not and even if the federal rule applied, the evidence was admissible because no timely motion to suppress had been made).

Table D.

STATES WHICH PASSED ON THE *Weeks* DOCTRINE FOR THE FIRST TIME AFTER THE *Weeks* DECISION AND IN SO DOING FOLLOWED IT.

FLA. *Atz* v. *Andrews,* 84 Fla. 43, 94 So. 329.

IND. *Flum* v. *State,* 193 Ind. 585, 141 N. E. 353.

KY. *Youman* v. *Commonwealth,* 189 Ky. 152, 224 S. W. 860.

MISS. *Tucker* v. *State,* 128 Miss. 211, 90 So. 845.

WIS. *Hoyer* v. *State,* 180 Wis. 407, 193 N. W. 89.

WYO. *State* v. *George,* 32 Wyo. 223, 231 P. 683.

Table E.

STATES WHICH PASSED ON THE *Weeks* DOCTRINE FOR THE FIRST TIME AFTER THE *Weeks* DECISION AND IN SO DOING REJECTED IT.

ARIZ. *Argetakis* v. *State,* 24 Ariz. 599, 212 P. 372.

CALIF. *People* v. *Mayen,* 188 Calif. 237, 205 P. 435 (adopting the general rule but distinguishing the cases then decided by this Court on the ground that they apply only when a timely motion for return of the property seized has been made).

COLO. *Massantonio* v. *People,* 77 Colo. 392, 236 P. 1019.

DEL. *State* v. *Chuchola,* 32 Del. 133, 120 A. 212 (distinguishing this Court's decisions).

LA. *State* v. *Fleckinger,* 152 La. 337, 93 So. 115. The constitutional convention of 1921 refused to adopt an amendment incorporating the federal rule. See *State* v. *Eddins,* 161 La. 240, 108 So. 468.

NEV. *State* v. *Chin Gim,* 47 Nev. 431, 224 P. 798.

N. J. *State* v. *Black,* 5 N. J. Misc. 48, 135 A. 685.

N. M. *State* v. *Dillon,* 34 N. M. 366, 281 P. 474.

N. D. *State* v. *Fahn,* 53 N. D. 203, 205 N. W. 67.

OHIO *State* v. *Lindway,* 131 Ohio St. 166, 2 N. E. 2d 490.

PA. *Commonwealth* v. *Dabbierio,* 290 Pa. 174, 138 A. 679.

TEX. *Welchek* v. *State,* 93 Tex. Cr. Rep. 271, 247 S. W. 524. In 1925 a statute changed the rule by providing that "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State

Table E—Continued.

STATES WHICH PASSED ON THE *Weeks* DOCTRINE FOR THE FIRST TIME AFTER THE *Weeks* DECISION AND IN SO DOING REJECTED IT.

of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Texas Laws 1925, c. 49, as amended, 2 Vernon's Tex. Stat., 1948 (Code of Crim. Proc.), Art. 727a.

UTAH *State* v. *Aime*, 62 Utah 476, 220 P. 704.

VA. *Hall* v. *Commonwealth*, 138 Va. 727, 121 S. E. 154.

Table F.

STATES WHICH, AFTER THE *Weeks* DECISION, OVERRULED OR DISTINGUISHED PRIOR CONTRARY DECISIONS.

IDAHO Idaho expressly refused to follow the *Weeks* decision in *State* v. *Myers*, 36 Idaho 396, 211 P. 440, but repudiated the *Myers* case and adopted the federal rule in *State* v. *Arregui*, 44 Idaho 43, 254 P. 788.

ILL. After two cases following the former state rule, Illinois adopted the federal rule in *People* v. *Castree*, 311 Ill. 392, 143 N. E. 112.

MICH. *People* v. *Marxhausen*, 204 Mich. 559, 171 N. W. 557 (distinguishing earlier cases on the ground that in them no preliminary motion to suppress had been made).

MO. *State* v. *Graham*, 295 Mo. 695, 247 S. W. 194, supported the old rule in a dictum, but the federal rule was adopted in *State* v. *Owens*, 302 Mo. 348, 259 S. W. 100 (distinguishing earlier cases on the ground that in them no preliminary motion to dismiss had been made).

MONT. *State ex rel. King* v. *District Court*, 70 Mont. 191, 224 P. 862.

OKLA. *Gore* v. *State*, 24 Okla. Cr. 394, 218 P. 545.

S. D. *State* v. *Gooder*, 57 S. D. 619, 234 N. W. 610. But cf. S. D. Laws 1935, c. 96, now S. D. Code § 34.1102 (1939), amending Rev. Code 1919, § 4606 (all evidence admis-

TABLE F—Continued.

STATES WHICH, AFTER THE *Weeks* DECISION, OVERRULED OR DISTINGUISHED PRIOR CONTRARY DECISIONS.

sible under a valid search warrant is admissible notwithstanding defects in the issuance of the warrant).

TENN. *Hughes* v. *State*, 145 Tenn. 544, 238 S. W. 588 (distinguishing *Cohn* v. *State*, *supra*, Table A).

WASH. *State* v. *Gibbons*, 118 Wash. 171, 203 P. 390.

W. VA. *State* v. *Andrews*, 91 W. Va. 720, 114 S. E. 257 (distinguishing earlier cases).

TABLE G.

STATES WHICH, AFTER THE *Weeks* DECISION, REVIEWED PRIOR CONTRARY DECISIONS AND IN SO DOING ADHERED TO THOSE DECISIONS.

ALA. *Banks* v. *State*, 207 Ala. 179, 93 So. 293.

ARK. *Benson* v. *State*, 149 Ark. 633, 233 S. W. 758.

CONN. *State* v. *Reynolds*, 101 Conn. 224, 125 A. 636.

GA. *Jackson* v. *State*, 156 Ga. 647, 119 S. E. 525.

KAN. *State* v. *Johnson*, 116 Kan. 58, 226 P. 245.

ME. *State* v. *Schoppe*, 113 Me. 10, 16, 92 A. 867, 869 (alternative holding, not noticing *Weeks*).

MD. *Meisinger* v. *State*, 155 Md. 195, 141 A. 536, 142 A. 190. But cf. Md. Laws 1929, c. 194, as amended, Md. Code Ann., Art. 35, § 5 (1947 Supp.) (in trial of misdemeanors, evidence obtained by illegal search and seizure is inadmissible).

MASS. *Commonwealth* v. *Wilkins*, 243 Mass. 356, 138 N. E. 11.

MINN. *State* v. *Pluth*, 157 Minn. 145, 195 N. W. 789.

NEB. *Billings* v. *State*, 109 Neb. 596, 191 N. W. 721.

N. H. *State* v. *Agalos*, 79 N. H. 241, 242, 107 A. 314, 315 (not noticing *Weeks*).

N. Y. *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585; *People* v. *Richter's Jewelers*, 291 N. Y. 161, 169, 51 N. E. 2d 690, 693 (holding that adoption of Amendment to State Con-

Table G—Continued.

STATES WHICH, AFTER THE *Weeks* DECISION, REVIEWED PRIOR CONTRARY DECISIONS AND IN SO DOING ADHERED TO THOSE DECISIONS.

stitution in same language as Civil Rights Law construed in the *Defore* case is not occasion for changing interpretation, especially since proceedings of the convention which framed the amendment show that no change was intended).

N. C. *State* v. *Simmons,* 183 N. C. 684, 110 S. E. 591 (distinguishing between evidentiary articles and corpus delicti).

Ore. See *State* v. *Folkes,* 174 Ore. 568, 588–89, 150 P. 2d 17, 25. But see *State* v. *Laundy,* 103 Ore. 443, 493–95, 204 P. 958, 974–75.

S. C. After granting a motion to return illegally seized property in *Blacksburg* v. *Beam,* 104 S. C. 146, 88 S. E. 441, South Carolina reaffirmed its agreement with the general rule in *State* v. *Green,* 121 S. C. 230, 114 S. E. 317.

Vt. *State* v. *Stacy,* 104 Vt. 379, 401, 160 A. 257, 266.

Table H.

STATE WHICH HAS REPUDIATED ITS PRIOR FORMULATION OF THE *Weeks* DOCTRINE.

Iowa *State* v. *Rowley,* 197 Iowa 977, 195 N. W. 881 (withdrawing earlier opinion in 187 N. W. 7).

Table I.

SUMMARY OF PRESENT POSITION OF STATES WHICH HAVE PASSED ON THE *Weeks* DOCTRINE.

(a) States that reject *Weeks:*

Ala., Ariz., Ark., Calif., Colo., Conn., Del., Ga., Iowa, Kan., La., Me., Md., Mass., Minn., Neb., Nev., N. H., N. J., N. M., N. Y., N. C., N. D., Ohio, Ore., Pa., S. C., Texas, Utah, Vt., Va.

(b) States that are in agreement with *Weeks:*

Fla., Idaho, Ill., Ind., Ky., Mich., Miss., Mo., Mont., Okla., S. D., Tenn., Wash., W. Va., Wis., Wyo.

TABLE J.

JURISDICTIONS OF THE UNITED KINGDOM AND THE BRITISH COMMONWEALTH OF NATIONS WHICH HAVE HELD ADMISSIBLE EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE.

AUSTRALIA	*Miller* v. *Noblet*, [1927] S. A. S. R. 385.
CANADA	
ALTA.	*Rex* v. *Nelson*, [1922] 2 W. W. R. 381, 69 D. L. R. 180.
MAN.	*Rex* v. *Duroussel*, 41 Man. 15, [1933] 2 D. L. R. 446.
ONT.	*Regina* v. *Doyle*, 12 Ont. 347.
SASK.	*Rex* v. *Kostachuk*, 24 Sask. 485, 54 Can. C. C. 189.
ENGLAND	See *Elias* v. *Pasmore*, [1934] 2 K. B. 164.
INDIA	
ALL.	*Ali Ahmad Khan* v. *Emperor*, 81 I. C. 615 (1).
CAL.	*Baldeo Bin* v. *Emperor*, 142 I. C. 639.
RANG.	*Chwa Hum Htive* v. *Emperor*, 143 I. C. 824.
SCOTLAND	See *Hodgson* v. *Macpherson*, [1913] S. C. (J.) 68, 73.

MR. JUSTICE BLACK, concurring.

In this case petitioner was convicted of a crime in a state court on evidence obtained by a search and seizure conducted in a manner that this Court has held "unreasonable" and therefore in violation of the Fourth Amendment. And under a rule of evidence adopted by this Court evidence so obtained by federal officers cannot be used against defendants in federal courts. For reasons stated in my dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of "unreasonable searches and seizures" is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited "unreasonable searches and seizures," but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is

not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. See *McNabb* v. *United States,* 318 U. S. 332. This leads me to concur in the Court's judgment of affirmance.

It is not amiss to repeat my belief that the Fourteenth Amendment was intended to make the Fourth Amendment in its entirety applicable to the states. The Fourth Amendment was designed to protect people against unrestrained searches and seizures by sheriffs, policemen and other law enforcement officers. Such protection is an essential in a free society. And I am unable to agree that the protection of people from over-zealous or ruthless state officers is any less essential in a country of "ordered liberty" than is the protection of people from over-zealous or ruthless federal officers. Certainly there are far more state than federal enforcement officers and their activities, up to now, have more frequently and closely touched the intimate daily lives of people than have the activities of federal officers. A state officer's "knock at the door . . . as a prelude to a search, without authority of law," may be, as our experience shows, just as ominous to "ordered liberty" as though the knock were made by a federal officer.

MR. JUSTICE DOUGLAS, dissenting.

I believe for the reasons stated by MR. JUSTICE BLACK in his dissent in *Adamson* v. *California,* 332 U. S. 46, 68, that the Fourth Amendment is applicable to the States. I agree with MR. JUSTICE MURPHY that the evidence obtained in violation of it *must* be excluded in state prosecutions as well as in federal prosecutions, since in absence of that rule of evidence the Amendment would have no effective sanction. I also agree with him that under that

test this evidence was improperly admitted and that the judgments of conviction must be reversed.

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE joins, dissenting.

It is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong. Of course I agree with the Court that the Fourteenth Amendment prohibits activities which are proscribed by the search and seizure clause of the Fourth Amendment. See my dissenting views, and those of MR. JUSTICE BLACK, in *Adamson* v. *California,* 332 U. S. 46, 68, 123. Quite apart from the blanket application of the Bill of Rights to the States, a devotee of democracy would ill suit his name were he to suggest that his home's protection against unlicensed governmental invasion was not "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325. It is difficult for me to understand how the Court can go this far and yet be unwilling to make the step which can give some meaning to the pronouncements it utters.

Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system. If we would attempt the enforcement of the search and seizure clause in the ordinary case today, we are limited to three devices: judicial exclusion of the illegally obtained evidence; criminal prosecution of violators; and civil action against violators in the action of trespass.

Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

This has been perfectly clear since 1914, when a unanimous Court decided *Weeks* v. *United States,* 232 U. S. 383, 393. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense," we said, "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." "It reduces the Fourth Amendment to a form of words." Holmes, J., for the Court, in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392.

Today the Court wipes those statements from the books with its bland citation of "other remedies." Little need be said concerning the possibilities of criminal prosecution. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.[1] But there is an appealing ring in another alternative. A trespass action for damages is a venerable means of securing reparation for unauthorized invasion of the home. Why not put the old writ to a new use? When the Court cites cases permitting the action, the remedy seems complete.

But what an illusory remedy this is, if by "remedy" we mean a positive deterrent to police and prosecutors

[1] See Pound, Criminal Justice in America (New York, 1930): "Under our legal system the way of the prosecutor is hard, and the need of 'getting results' puts pressure upon prosecutors to . . . indulge in that lawless enforcement of law which produces a vicious circle of disrespect for law." P. 186.

And note the statement of the Wickersham Commission, with reference to arrests: ". . . in case of persons of no influence or little or no means the legal restrictions are not likely to give an officer serious trouble." II National Commission on Law Observance and Enforcement, Report on Criminal Procedure (1931), p. 19.

tempted to violate the Fourth Amendment. The appealing ring softens when we recall that in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar. Are punitive damages possible? Perhaps. But a few states permit none, whatever the circumstances.[2] In those that do, the plaintiff must show the real ill will or malice of the defendant,[3] and surely it is not unreasonable to assume that one in honest pursuit of crime bears no malice toward the search victim. If that burden is carried, recovery may yet be defeated by the rule that there must be physical damages before punitive damages may be awarded.[4] In addition, some states limit punitive damages to the actual expenses of litigation. See 61 Harv. L. Rev. 113, 119–120. Others demand some arbitrary ratio between actual and punitive damages before a verdict may stand. See Morris, *Punitive Damages in Tort Cases,* 44 Harv. L. Rev. 1173, 1180–1181. Even assuming the ill will of the officer, his reasonable grounds for belief that the home he searched harbored evidence of crime is admissible in mitigation of punitive damages. *Gamble* v. *Keyes,* 35 S. D. 644, 153 N. W. 888; *Simpson* v. *McCaffrey,* 13 Ohio 508. The bad reputation of the plaintiff is likewise admissible. *Banfill* v. *Byrd,* 122 Miss. 288, 84 So. 227. If the evidence seized was actually used at a trial, that fact has been

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[2] See McCormick, Damages, § 78. See Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual,* 22 Harv. L. Rev. 419.

[3] *Id.,* § 79. See *Fennemore* v. *Armstrong,* 29 Del. 35, 96 A. 204.

[4] "It is a well settled and almost universally accepted rule in the law of damages that a finding of exemplary damages must be predicated upon a finding of actual damages." 17 Iowa L. Rev. 413, 414. This appears to be an overstatement. See McCormick, *supra,* § 83; Restatement IV, Torts, § 908, comment *c.*

held a complete justification of the search, and a defense against the trespass action. *Elias* v. *Pasmore* [1934] 2 K. B. 164. And even if the plaintiff hurdles all these obstacles, and gains a substantial verdict, the individual officer's finances may well make the judgment useless—for the municipality, of course, is not liable without its consent. Is it surprising that there is so little in the books concerning trespass actions for violation of the search and seizure clause?

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

If proof of the efficacy of the federal rule were needed, there is testimony in abundance in the recruit training programs and in-service courses provided the police in states which follow the federal rule.[5] St. Louis, for example, demands extensive training in the rules of search and seizure, with emphasis upon the ease with which a case may collapse if it depends upon evidence obtained

[5] The material which follows is gleaned from letters and other material from Commissioners of Police and Chiefs of Police in twenty-six cities. Thirty-eight large cities in the United States were selected at random, and inquiries directed concerning the instructions provided police on the rules of search and seizure. Twenty-six replies have been received to date. Those of any significance are mentioned in the text of this opinion. The sample is believed to be representative, but it cannot, of course, substitute for a thoroughgoing comparison of present-day police procedures by a completely objective observer. A study of this kind would be of inestimable value.

unlawfully. Current court decisions are digested and read at roll calls. The same general pattern prevails in Washington, D. C.[6] In Dallas, officers are thoroughly briefed and instructed that "the courts will follow the rules very closely and will detect any frauds." [7] In Milwaukee, a stout volume on the law of arrest and search and seizure is made the basis of extended instruction.[8] Officer preparation in the applicable rules in Jackson, Mississippi, has included the lectures of an Associate Justice of the Mississippi Supreme Court. The instructions on evidence and search and seizure given to trainees in San Antonio carefully note the rule of exclusion in Texas, and close with this statement: "Every police officer should know the laws and the rules of evidence. Upon knowledge of these facts determines whether the . . . defendant will be convicted or acquitted. . . . When you investigate a case . . . remember throughout your investigation that only admissible evidence can be used."

But in New York City, we are informed simply that "copies of the State Penal Law and Code of Criminal Procedure" are given to officers, and that they are "kept advised" that illegally obtained evidence may be admitted in New York courts. In Baltimore, a "Digest of Laws" is distributed, and it is made clear that the

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[6] *E. g.*, Assistant Superintendent Truscott's letter to the Washington Police Force of January 3, 1949, concerning *McDonald* v. *United States*, 335 U. S. 451.

[7] Recently lectures have included two pages of discussion of the opinions in *Harris* v. *United States*, 331 U. S. 145.

[8] Chief of Police John W. Polcyn notes, in a Foreword to the book, that officers were often not properly informed with respect to searches and seizures before thoroughgoing instruction was undertaken. One of their fears was that of "losing their cases in court, only because they neglected to do what they might have done with full legal sanction at the time of the arrest, or did what they had no legal right to do at such time."

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statutory section excluding evidence "is limited in its application to the trial of misdemeanors. . . . It would appear . . . that . . . evidence illegally obtained may still be admissible in the trial of felonies." In Cleveland, recruits and other officers are told of the rules of search and seizure, but "instructed that it is admissible in the courts of Ohio. The Ohio Supreme Court has indicated very definitely and clearly that Ohio belongs to the 'admissionist' group of states when evidence obtained by an illegal search is presented to the court." A similar pattern emerges in Birmingham, Alabama.

The contrast between states with the federal rule and those without it is thus a positive demonstration of its efficacy. There are apparent exceptions to the contrast—Denver, for example, appears to provide as comprehensive a series of instructions as that in Chicago, although Colorado permits introduction of the evidence and Illinois does not. And, so far as we can determine from letters, a fairly uniform standard of officer instruction appears in other cities, irrespective of the local rule of evidence. But the examples cited above serve to ground an assumption that has motivated this Court since the *Weeks* case: that this is an area in which judicial action has positive effect upon the breach of law; and that, without judicial action, there are simply no effective sanctions presently available.

I cannot believe that we should decide due process questions by simply taking a poll of the rules in various jurisdictions, even if we follow the *Palko* "test." Today's decision will do inestimable harm to the cause of fair police methods in our cities and states. Even more important, perhaps, it must have tragic effect upon public respect for our judiciary. For the Court now allows what is indeed shabby business: lawlessness by officers of the law.

Since the evidence admitted was secured in violation of the Fourth Amendment, the judgment should be reversed.

MR. JUSTICE RUTLEDGE, dissenting.

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Similarly, one should not reject a piecemeal wisdom, merely because it hobbles toward the truth with backward glances. Accordingly, although I think that all "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment," *Adamson* v. *California,* 332 U. S. 46, dissenting opinion at 124, I welcome the fact that the Court, in its slower progress toward this goal, today finds the substance of the Fourth Amendment "to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, . . . valid as against the states." *Palko* v. *Connecticut,* 302 U. S. 319, 325.

But I reject the Court's simultaneous conclusion that the mandate embodied in the Fourth Amendment, although binding on the states, does not carry with it the one sanction—exclusion of evidence taken in violation of the Amendment's terms—failure to observe which means that "the protection of the Fourth Amendment . . . might as well be stricken from the Constitution." *Weeks* v. *United States,* 232 U. S. 383, 393. For I agree with my brother MURPHY'S demonstration that the Amendment without the sanction is a dead letter. Twenty-nine years ago this Court, speaking through Justice Holmes, refused to permit the Government to subpoena documentary evidence which it had stolen, copied and then returned, for the reason that such a procedure "reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392. But the version of the Fourth Amendment today held

applicable to the states hardly rises to the dignity of a form of words; at best it is a pale and frayed carbon copy of the original, bearing little resemblance to the Amendment the fulfillment of whose command I had heretofore thought to be "an indispensable need for a democratic society." *Harris* v. *United States,* 331 U. S. 145, dissenting opinion at 161.

I also reject any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment. I had thought that issue settled by this Court's invalidation on dual grounds, in *Boyd* v. *United States,* 116 U. S. 616, of a federal statute which in effect required the production of evidence thought probative by Government counsel—the Court there holding the statute to be "obnoxious to the prohibition of the Fourth Amendment of the Constitution, as well as of the Fifth." *Id.* at 632. See *Adams* v. *New York,* 192 U. S. 585, 597, 598. The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established. See *Olmstead* v. *United States,* 277 U. S. 438, 462. It is too late in my judgment to question it now. We apply it today in *Lustig* v. *United States, post,* p. 74.

As Congress and this Court are, in my judgment, powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment, so I think state legislators and judges—if subject to the Amendment, as I believe them to be—may not lend their offices to the admission in state courts of evidence thus seized. Compliance with the Bill of Rights betokens more than lip service.

The Court makes the illegality of this search and seizure its inarticulate premise of decision. I acquiesce in that premise and think the convictions should be reversed.

MR. JUSTICE MURPHY joins in this opinion.

WATTS *v.* INDIANA.

CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 610. Argued April 25, 1949.—Decided June 27, 1949.

Petitioner was arrested on suspicion on a Wednesday and held without arraignment, without the aid of counsel or friends and without advice as to his constitutional rights, until the following Tuesday, when he confessed to murder. Meanwhile he was held much of the time in solitary confinement in a cell with no place to sit or sleep except the floor and was interrogated by relays of police officers, usually until long past midnight. At his trial in a state court, the confession was admitted in evidence over his objection and he was convicted. *Held:* The use at the trial of a confession obtained in this manner violated the Due Process Clause of the Fourteenth Amendment and the conviction is reversed. Pp. 49–55.

226 Ind. 655, 82 N. E. 2d 846, reversed.

The Supreme Court of Indiana affirmed petitioner's conviction for murder, notwithstanding his contention that his confession was procured under circumstances rendering its admission in evidence a denial of due process of law. 226 Ind. 655, 82 N. E. 2d 846. This Court granted certiorari. 336 U. S. 917. *Reversed,* p. 55.

Franklin H. Williams and *Thurgood Marshall* argued the cause for petitioner. With them on the brief were *Robert L. Carter* and *Henry J. Richardson.*

Frank E. Coughlin, Deputy Attorney General of Indiana, argued the cause for respondent. With him on the brief were *J. Emmett McManamon,* Attorney General, *Earl R. Cox* and *Merl M. Wall,* Deputy Attorneys General.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join.

Although the Constitution puts protection against crime predominantly in the keeping of the States, the

Fourteenth Amendment severely restricted the States in their administration of criminal justice. Thus, while the State courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility there hangs over them the reviewing power of this Court.[1] Power of such delicacy and import must, of course, be exercised with the greatest forbearance. When, however, appeal is made to it, there is no escape. And so this Court once again must meet the uncongenial duty of testing the validity of a conviction by a State court for a State crime by what is to be found in the Due Process Clause of the Fourteenth Amendment. This case is here because the Supreme Court of Indiana rejected petitioner's claim that confessions elicited from him were procured under circumstances rendering their admission as evidence against him a denial of due process of law.[2] 226 Ind. 655, 82 N. E. 2d 846. The grounds on which our review was sought seemed sufficiently weighty to grant the petition for certiorari. 336 U. S. 917.

On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this re-

[1] Of course this Court does not have the corrective power over State courts that it has over the lower federal courts. See, e. g., *McNabb* v. *United States,* 318 U. S. 332. In the main, the proper administration of the criminal law of the States rests with the State courts. The nature of the Due Process Clause, however, potentially gives wide range to the reviewing power of this Court over State-court convictions.

[2] In the petitioner's statements there was acknowledgment of the possession of an incriminating gun, the existence of which the police independently established. But a coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true. See *Lisenba* v. *California,* 314 U. S. 219, 236–237.

striction in our review of State courts calls for the utmost scruple. But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659, and cases cited. Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. See *Norris* v. *Alabama,* 294 U. S. 587, 589–90; *Marsh* v. *Alabama,* 326 U. S. 501, 510.

In the application of so embracing a constitutional concept as "due process," it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder,[3] there has been complete agreement that any

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[3] The validity of a conviction because an allegedly coerced confession was used has been called into question in the following cases:

(A) Confession was found to be procured under circumstances violative of the Due Process Clause in *Haley* v. *Ohio,* 332 U. S. 596; *Malinski* v. *New York,* 324 U. S. 401; *Ashcraft* v. *Tennessee,* 322 U. S. 143; *Ward* v. *Texas,* 316 U. S. 547; *Lomax* v. *Texas,* 313 U. S. 544; *Vernon* v. *Alabama,* 313 U. S. 547; *White* v. *Texas,* 310 U. S. 530; *Canty* v. *Alabama,* 309 U. S. 629; *White* v. *Texas,* 309 U. S. 631; *Chambers* v. *Florida,* 309 U. S. 227; *Brown* v. *Mississippi,* 297 U. S. 278; and see *Ashcraft* v. *Tennessee,* 327 U. S. 274.

(B) Confession was found to have been procured under circumstances not violative of the Due Process Clause in *Lyons* v. *Oklahoma,* 322 U. S. 596, and *Lisenba* v. *California,* 314 U. S. 219.

conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men. See Taft, C. J., in the *Child Labor Tax Case,* 259 U. S. 20, 37.

This brings us to the undisputed circumstances which must determine the issue of due process in this case. Thanks to the forthrightness of counsel for Indiana, these circumstances may be briefly stated.

On November 12, 1947, a Wednesday, petitioner was arrested and held as the suspected perpetrator of an alleged criminal assault earlier in the day. Later the same day, in the vicinity of this occurrence, a woman was found dead under conditions suggesting murder in the course of an attempted criminal assault. Suspicion of murder quickly turned towards petitioner and the police began to question him. They took him from the county jail to State Police Headquarters, where he was questioned by officers in relays from about 11:30 that night until sometime between 2:30 and 3 o'clock the following morning. The same procedure of persistent interrogation from about 5:30 in the afternoon until about 3 o'clock the following morning, by a relay of six to eight officers, was pursued on Thursday the 13th, Friday the 14th, Saturday the 15th, Monday the 17th. Sunday was a day of rest from interrogation. About 3 o'clock on Tuesday morning, November 18, the petitioner made an incriminating statement after continuous

questioning since 6 o'clock of the preceding evening. The statement did not satisfy the prosecutor who had been called in and he then took petitioner in hand. Petitioner, questioned by an interrogator of twenty years' experience as lawyer, judge and prosecutor, yielded a more incriminating document.

Until his inculpatory statements were secured, the petitioner was a prisoner in the exclusive control of the prosecuting authorities. He was kept for the first two days in solitary confinement in a cell aptly enough called "the hole" in view of its physical conditions as described by the State's witnesses. Apart from the five night sessions, the police intermittently interrogated Watts during the day and on three days drove him around town, hours at a time, with a view to eliciting identifications and other disclosures. Although the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate, with all the protection a hearing was intended to give him, the petitioner was not only given no hearing during the entire period of interrogation but was without friendly or professional aid and without advice as to his constitutional rights. Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant, not as aggravating elements of petitioner's treatment, but as part of the total situation out of which his confessions came and which stamped their character.

A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would

have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America,* 48 Harv. L. Rev. 433, 457–58, 467–473 (1935). Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown, c. 46, § 34 (8th ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands.

Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards. For while under that system the accused is subjected to judicial interrogation, he is protected by the disinterestedness of the judge in the presence of counsel. See Keedy, *The Preliminary Investigation of Crime in France,* 88 U. of Pa. L. Rev. 692, 708–712 (1940).

In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken. We are deeply mindful of the anguishing problems which the incidence of crime presents to the States. But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case. See, *e. g.,* Radzinowicz, A History of English Criminal Law and its Administration from 1750, *passim* (1948). Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective.

We have examined petitioner's other contentions and do not sustain them.

Reversed.

MR. JUSTICE BLACK concurs in the judgment of the Court on the authority of *Chambers* v. *Florida,* 309 U. S. 227; *Ashcraft* v. *Tennessee,* 322 U. S. 143.

On the record before us and in view of the consideration given to the evidence by the state courts and the conclu-

sion reached, THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE BURTON believe that the judgment should be affirmed.

MR. JUSTICE DOUGLAS, concurring.

The following are the undisputed facts:

Petitioner was taken into custody early in the afternoon on Wednesday, November 12, 1947. He was first detained on suspicion of having committed a criminal assault, and it was not until later in the day of his arrest that he was suspected of having committed the murder for which he was later tried and convicted. He was held without being arraigned, until the following Tuesday when he gave a confession that satisfied the police. At no time was he advised of his right to remain silent, nor did he have the advice of family, friends or counsel during his confinement. He was not promptly arraigned as Indiana law requires.

During this confinement, petitioner was held in the county jail. The first two days he was placed in solitary confinement in a cell known among the prisoners as "the hole." There was no place on which to sit or sleep except the floor. Throughout this six-day confinement petitioner was subjected each day, except Sunday, to long periods of interrogation. He was moved to the State Police Headquarters for these questionings. The question period would usually begin about six o'clock in the evening, except for the first night when it began about eleven thirty. Each question period would extend to two or three o'clock the following morning. These interrogations were conducted by relays of small groups of officers. On several occasions petitioner was given lie-detector tests. Following the evening's interrogation, he would be returned to the county jail. Even then he was not always given respite until the next evening's ordeal commenced. He was subjected to intermittent

questioning during the day, and on three afternoons he was driven about the town for several hours by the police in an attempt to elicit further information and to reconstruct petitioner's activities the day of the crime.

It was about two or three o'clock Tuesday morning after about seven hours' interrogation that petitioner gave the confession used against him over objection at his trial. This was after six days of confinement.

It would be naive to think that this protective custody was less than the inquisition. The man was held until he broke. Then and only then was he arraigned and given the protection which the law provides all accused. Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw, as we did in *Malinski* v. *New York,* 324 U. S. 401, and *Haley* v. *Ohio,* 332 U. S. 596, any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country.

MR. JUSTICE JACKSON concurring in the result in No. 610 and dissenting in Nos. 76 and 107.*

These three cases, from widely separated states, present essentially the same problem. Its recurrence suggests that it has roots in some condition fundamental and general to our criminal system.

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*[For other opinions in No. 76, *Harris* v. *South Carolina,* and No. 107, *Turner* v. *Pennsylvania,* see *post,* pp. 68, 62.]

In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him. This extended over varying periods. In each, confessions were made and received in evidence at the trial. Checked with external evidence, they are inherently believable, and were not shaken as to truth by anything that occurred at the trial. Each confessor was convicted by a jury and state courts affirmed. This Court sets all three convictions aside.

The seriousness of the Court's judgment is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.

A concurring opinion, however, goes to the very limit and seems to declare for outlawing any confession, however freely given, if obtained during a period of custody between arrest and arraignment—which, in practice, means all of them.

Others would strike down these confessions because of conditions which they say make them "involuntary." In this, on only a printed record, they pit their judgment against that of the trial judge and the jury. Both, with the great advantage of hearing and seeing the confessor and also the officers whose conduct and bearing toward him is in question, have found that the confessions were voluntary. In addition, the majority overrule in each

case one or more state appellate courts, which have the same limited opportunity to know the truth that we do.

Amid much that is irrelevant or trivial, one serious situation seems to me to stand out in these cases. The suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

If the State may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has "told all" and turned any evidence he has over to the Government, knows how helpless he is to protect his client against the facts thus disclosed.

I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before? Our system comes close to the latter by any interpretation, for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him.

Of course, no confession that has been obtained by any form of physical violence to the person is reliable and

hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body. If the opinion of MR. JUSTICE FRANKFURTER in the *Watts* case were based solely on the State's admissions as to the treatment of Watts, I should not disagree. But if ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?

We must not overlook that, in these as in some previous cases, once a confession is obtained it supplies ways of verifying its trustworthiness. In these cases before us the verification is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful. Such corroboration consists in one case of finding a weapon where the accused has said he hid it, and in others that conditions which could only have been known to one who was implicated correspond with his story. It is possible, but it is rare, that a confession, if repudiated on the trial, standing alone will convict unless there is external proof of its verity.

In all such cases, along with other conditions criticized, the continuity and duration of the questioning is invoked and it is called an "inquiry," "inquest" or "inquisition," depending mainly on the emotional state of the writer. But as in some of the cases here, if interrogation is permissible at all, there are sound reasons for prolonging it—which the opinions here ignore. The suspect at first perhaps makes an effort to exculpate himself by alibis or other statements. These are verified, found false, and he is then confronted with his falsehood. Sometimes

(though such cases do not reach us) verification proves them true or credible and the suspect is released. Sometimes, as here, more than one crime is involved. The duration of an interrogation may well depend on the temperament, shrewdness and cunning of the accused and the competence of the examiner. But, assuming a right to examine at all, the right must include what is made reasonably necessary by the facts of the particular case.

If the right of interrogation be admitted, then it seems to me that we must leave it to trial judges and juries and state appellate courts to decide individual cases, unless they show some want of proper standards of decision. I find nothing to indicate that any of the courts below in these cases did not have a correct understanding of the Fourteenth Amendment, unless this Court thinks it means absolute prohibition of interrogation while in custody before arraignment.

I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.

I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those sus-

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pected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as "due process of law"? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society.

TURNER *v.* PENNSYLVANIA.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 107. Argued November 16–17, 1948.—Decided June 27, 1949.

Petitioner was arrested on suspicion and held for five days without arraignment, without the aid of counsel or friends and without being advised of his constitutional rights. Meanwhile, he was interrogated by relays of police officers, sometimes during both the day and the night, until he confessed to murder. It was admitted that arraignment was purposely delayed until a confession could be obtained. At his trial in a state court, the confession was admitted in evidence over his objection and he was convicted. *Held:* The use at the trial of a confession thus obtained violated the Due Process Clause of the Fourteenth Amendment and the conviction is reversed. *Watts* v. *Indiana, ante,* p. 49. Pp. 63–66.

358 Pa. 350, 58 A. 2d 61, reversed.

The Supreme Court of Pennsylvania affirmed petitioner's conviction for murder, notwithstanding his claim that his confession was procured under circumstances rendering its admission in evidence a denial of due process of law. 358 Pa. 350, 58 A. 2d 61. This Court granted certiorari. 334 U. S. 858. *Reversed,* p. 66.

Edwin P. Rome argued the cause for petitioner. With him on the brief was *Clinton Budd Palmer.*

Colbert C. McClain argued the cause for respondent. With him on the brief was *John H. Maurer.*

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join.

Our ruling in *Watts* v. *Indiana, ante,* p. 49, is decisive of the present case. It is also a capital case in which the petitioner claims that his conviction for first-degree murder resulted from the use of incriminatory statements obtained under circumstances which should have barred their admission. The Supreme Court of Pennsylvania, in affirming the conviction, rejected this claim. 358 Pa. 350, 58 A. 2d 61. We brought the case here to measure against the requirements of due process the circumstances giving rise to the claim. 334 U. S. 858. Again we take conflicts of testimony as they were resolved by the State's adjudication.

For six months the Philadelphia police had been investigating the felonious death of one Frank Andres. At 10:30 in the morning of June 3, 1946, they arrested Aaron Turner, the petitioner, on suspicion of the homicide and took him to the office of the Homicide Division at the City Hall Building. The officers making the arrest had no warrant and did not tell the petitioner why he was being arrested. These officers began to question the petitioner as soon as they reached the City Hall police station. One of them examined the petitioner for three hours on that afternoon and again that night from eight to eleven o'clock. From time to time other officers joined in the interrogation. Petitioner persistently denied any knowledge of the murder.

The next morning, June 4, the petitioner was booked on the police records as being held for questioning. Later that day he was questioned for about four hours more. On June 5 he was interrogated for another four hours and on the 6th for day and night sessions totaling six hours. The questioning was conducted sometimes by one officer and at other times by several working together; it appears,

in fact, that whenever one of the police officers interested in the investigation had any free time he would have the petitioner brought from his cell for questioning.

On June 7, the day when a confession was finally obtained, questioning began in the afternoon and continued for three hours. Later that day the officers who had been present during the afternoon returned with others to resume the examination of petitioner. Despite the fact that he was falsely told that other suspects had "opened up" on him, petitioner repeatedly denied guilt. But finally, at about eleven o'clock, petitioner stated that he had killed the person for whose murder he was later arraigned. At nine o'clock the following morning the same police officers started to reduce his statement to writing, interrupted this process to bring him for a preliminary hearing before a magistrate sitting in the same building, and returned to the transcript of his statement which was completed by about noon.

The petitioner was not permitted to see friends or relatives during the entire period of custody; he was not informed of his right to remain silent until after he had been under the pressure of a long process of interrogation and had actually yielded to it. With commendable candor the district attorney admitted that a hearing was withheld until interrogation had produced confession. The delay of five days thus accounted for was in violation of a Pennsylvania statute which requires that arrested persons be given a prompt preliminary hearing.

At the trial, petitioner objected to the introduction of his statement on the ground that it was the product of police conduct of a nature condemned by our previous cases. The trial judge overruled petitioner's objection to the use of the confession but told the jury to disregard it if they found it to have been involuntary. He also told them that it was common sense "not [to] send them [suspects] to the magistrate before you have sufficient

information to hold an alleged culprit for the Grand Jury." He refused to charge that in considering the voluntariness of the confession the prolonged interrogation should be considered.

The jury returned a verdict of guilty and recommended the death penalty. The Supreme Court of Pennsylvania affirmed the conviction in an opinion stressing the probable guilt of the petitioner and assuming that the alternatives before it were either to approve the conduct of the police or to turn the petitioner "loose upon [society] after he has confessed his guilt." 358 Pa. at 367.

Putting this case beside the considerations set forth in our opinion in *Watts* v. *Indiana, ante,* p. 49, leaves open no other possible conclusion than that petitioner's confession was obtained under circumstances which made its use at the trial a denial of due process. We must, accordingly, reverse the judgment and remand the case.

There remains, however, an additional complication. The police arrested two other men, Johnson and Lofton, who were suspected as co-principals with Turner in the Andres murder. These two also made confessions involving Turner as well as themselves. Turner signed their confessions and they were introduced against him at the trial. Since a new trial is called for, issues raised by these confessions call for notice.

Clearly the same considerations that bar admission of the confession by Turner made over his own name extend to his contemporaneous adoption of the Johnson and Lofton confessions. But these statements may be introduced not as his own confessions but as confessions by co-principals. In that event Pennsylvania may, as a matter of local evidentiary law, hold that the hearsay rule requires the exclusion of statements by co-principals not on trial. Assuming, however, that as a matter of local law these statements are admissible, there would then arise the question whether under the Fourteenth

Amendment a coerced statement may be excluded on objection of one not coerced into making it. At this stage, however, this is a wholly hypothetical question which, as a constitutional issue, we ought not hypothetically to answer. We could not answer it, in any event, without knowledge that Johnson's and Lofton's confessions were also coerced, and the facts necessary to that determination are not before us.

Such other contentions as the use of statements made at a magistrate's hearing when the accused had no counsel may be disposed of by Pennsylvania cases, or for other reasons may fail to arise on retrial of the case. See, e. g., *Commonwealth* v. *Lenousky,* 206 Pa. 277, 55 A. 977, cited with approval in *Commonwealth* v. *Westwood,* 324 Pa. 289, 188 A. 304.

Reversed.

MR. JUSTICE BLACK concurs in the judgment on the authority of *Chambers* v. *Florida,* 309 U. S. 227; *Ashcraft* v. *Tennessee,* 322 U. S. 143.

On the record before us and in view of the consideration given to the evidence by the state courts and the conclusion reached, THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE BURTON believe that the judgment should be affirmed.

[See *ante,* p. 57, for opinion of MR. JUSTICE JACKSON, concurring in the result in No. 610, *Watts* v. *Indiana, ante,* p. 49, and dissenting in this case and in No. 76, *Harris* v. *South Carolina, post,* p. 68.]

MR. JUSTICE DOUGLAS, concurring.

The undisputed facts surrounding the arrest and confession of the petitioner in this case are as follows:

Petitioner was arrested June 3, 1946, on suspicion of committing a homicide about six months after the crime

had been committed. At the time of his arrest he was not taken before a committing magistrate, as required by Pennsylvania law. He was held five days before being lawfully committed to custody. During this confinement he did not have the aid of family, friends, or counsel. He was not informed of his constitutional rights at the outset of his detention.

During this confinement petitioner was subject to continual interrogations by a number of police officers, who questioned him individually and in small groups. The day of his arrest he was questioned about three hours in the afternoon and again in the evening. The next two days he was questioned three to four hours in the afternoon. The next day the questioning was intensified and he was again subjected to both day and evening sessions. On the 7th of June, the day he finally confessed, the interrogations were intensive, once again being held afternoon and evening. Petitioner denied his guilt, even after being informed that other suspects had issued statements incriminating him. About eleven o'clock in the evening, after three hours of interrogation, petitioner finally indicated that he wished to make a statement. This confession was set down on paper the next day, and petitioner signed it after he had been committed by a magistrate.

These interrogations had been conducted by at least seven different officers. They were conducted in petitioner's cell, in a small office, and in a room which had a stand-up screen where suspects were put for identification. It was admitted that the reason petitioner was not brought before a magistrate was because he had not given the answers which the police wanted and which they believed he could give.

The case is but another vivid illustration of the use of illegal detentions to exact confessions. It is governed by *Watts* v. *Indiana, ante,* p. 49, decided this day.

HARRIS *v.* SOUTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 76. Argued November 16, 1948.—Decided June 27, 1949.

Suspected of murder in South Carolina, petitioner, an illiterate negro, was arrested in Tennessee on Friday and taken to South Carolina on Sunday. The South Carolina sheriff had obtained a warrant for his arrest for theft of a pistol, but it was not read to him nor was he informed of the charge against him. Confined in a small hot room, he was interrogated daily and nightly by relays of police officers until he confessed to the murder on Wednesday night, after the police had threatened to arrest his mother. Meanwhile, he was denied counsel and access to family and friends, was not given a preliminary hearing, and was not informed of his constitutional rights. At his trial in a state court, the confession was admitted in evidence over his objection and he was convicted. *Held:* The use of a confession obtained in this manner violated the Due Process Clause of the Fourteenth Amendment and the conviction is reversed. *Watts* v. *Indiana, ante,* p. 49; *Turner* v. *Pennsylvania, ante,* p. 62. Pp. 68–71.

212 S. C. 124, 46 S. E. 2d 682, reversed.

The Supreme Court of South Carolina affirmed petitioner's conviction for murder, notwithstanding his claim that his confession was obtained under circumstances rendering its admission in evidence a denial of due process of law. 212 S. C. 124, 46 S. E. 2d 682. This Court granted certiorari. 334 U. S. 837. *Reversed,* p. 71.

Julian B. Salley, Jr. and *Leonard A. Williamson* argued the cause and filed a brief for petitioner.

B. D. Carter argued the cause for respondent. With him on the brief was *John M. Daniel,* Attorney General of South Carolina.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join.

On Sunday morning, April 28, 1946, Edward L. Bennett and his wife were killed in their store in Aiken

County, South Carolina. Bennett's last words were, "A big negro shot me and robbed me." Petitioner, Harris, age twenty-five, a slightly built Negro, was subsequently indicted in the Court of General Sessions for Aiken County and found guilty of the murder of the Bennetts. The jury's verdict required imposition of the death sentence. The Supreme Court of South Carolina denied the claim that a confession introduced at the trial was obtained under circumstances which precluded its admission under the Due Process Clause and sustained the conviction, 212 S. C. 124, 46 S. E. 2d 682, by a 3–2 vote, two judges dissenting on the ground that the facts show that the confession "was not freely and voluntarily made." We brought the case here to consider the validity of this claim. 334 U. S. 837.

When the disputed testimony is resolved in favor of the State, the following facts emerge:

The police of Aiken County spent two and a half months in fruitless investigation of the murders. Many suspects had been held for interrogation and then released. Suspicion was finally directed toward petitioner by reports that he possessed a pistol and had left for Nashville, Tennessee, soon after the murders. The Sheriff of Aiken County then obtained a warrant, ostensibly for the purpose of arresting petitioner for the theft of his aunt's pistol but actually to secure his return from Nashville. He was taken into custody there on Friday, July 12, 1946. No warrant was read to him and he was not informed of the charge against him. He was brought back to Aiken County and lodged in its jail on Sunday afternoon at about four o'clock. He first learned that he was suspected of the murder of Bennett on Monday afternoon. He denied the accusation. At that time he was briefly interrogated by the sheriff and the jailer.

On Monday night questioning began in earnest. At least five officers worked in relays, relieving each other

from time to time to permit respite from the stifling heat of the cubicle in which the interrogation was conducted. Throughout the evening petitioner denied that he had killed the Bennetts. On Tuesday the questioning continued under the same conditions from 1:30 in the afternoon until past one the following morning with only an hour's interval at 5:30. On Wednesday afternoon the Chief of the State Constabulary, with half a dozen of his men, questioned petitioner for about an hour, and the local authorities carried on the interrogation for three and a half hours longer. At 6:30 that evening the examination resumed. Petitioner continued to deny implication in the killings. The sheriff then threatened to arrest petitioner's mother for handling stolen property. Petitioner replied, "Don't get my mother mixed up in it and I will tell you the truth." Petitioner then stated in substance what appears in the confession introduced at the trial. The session ended at midnight.

Petitioner was not informed of his rights under South Carolina law, such as the right to secure a lawyer, the right to request a preliminary hearing, or the right to remain silent. No preliminary hearing was ever given and his confession does not even contain the usual statement that he was told that what he said might be used against him. During the whole period of interrogation he was denied the benefit of consultation with family and friends and was surrounded by as many as a dozen members of a dominant group in positions of authority. It is relevant to note that Harris was an illiterate.

The trial judge in his charge told the jury that without the confession there was no evidence which would support a conviction and instructed them that they could consider the confession only if they found it to have been "voluntary." Upon appeal, the highest court of the State made a conscientious effort to measure the circumstances under which petitioner's confession was made against the

circumstances surrounding confessions which we have held to be the product of undue pressure. It concluded that this confession was not so tainted. We are constrained to disagree. The systematic persistence of interrogation, the length of the periods of questioning, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the defendant constitute a complex of circumstances which invokes the same considerations which compelled our decisions in *Watts* v. *Indiana, ante,* p. 49, and *Turner* v. *Pennsylvania, ante,* p. 62. The judgment is accordingly

Reversed.

MR. JUSTICE BLACK concurs in the judgment on the authority of *Chambers* v. *Florida,* 309 U. S. 227; *Ashcraft* v. *Tennessee,* 322 U. S. 143.

On the record before us and in view of the consideration given to the evidence by the state courts and the conclusion reached, THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE BURTON believe that the judgment should be affirmed.

[See *ante,* p. 57, for opinion of MR. JUSTICE JACKSON, concurring in the result in No. 610, *Watts* v. *Indiana, ante,* p. 49, and dissenting in this case and in No. 107, *Turner* v. *Pennsylvania, ante,* p. 62.]

MR. JUSTICE DOUGLAS, concurring.

The undisputed facts concerning the arrest and interrogation of the petitioner are as follows:

A storekeeper and his wife were killed in Aiken, South Carolina. The killing seemed similar to other crimes which had been committed in the community and which constituted a local crime wave. Local feeling was running high and the sheriff's office was anxious to find a

solution. Numerous persons were interrogated. Nearly three months later suspicion fell on petitioner, because it became known that he possessed a pistol and had left the community for Nashville, Tennessee, shortly after the murder had occurred. The sheriff secured a warrant of arrest for the petitioner, allegedly for possessing a stolen pistol. The authorities in Nashville were notified that petitioner was wanted, and he was picked up there and placed in custody on a Friday. On the next Sunday he was delivered to the South Carolina officers. He was not read the warrant of arrest, nor was he informed that he was suspected of having committed the murder with which he was later charged and now stands convicted. While handcuffed, he was driven back to Aiken and lodged in the Aiken jail late that afternoon without being brought before a magistrate. That was Sunday. It was not until Monday afternoon that he was informed that he was under suspicion of having committed the murder. He was questioned a short time. He denied his guilt. A more extended questioning was held that night. The next day, Tuesday, the vigor of the questioning was increased. Petitioner was interrogated in the afternoon and again in the evening until around midnight. It was during this session that two incidents occurred. Petitioner had denied his guilt, but finally made a statement implicating another negro, who denied guilt when confronted with the accusation. It was also on Tuesday evening that one of the officers laid a hand on the petitioner. Sharp issue is taken on the nature of this act. Petitioner contends that he was struck with force. The officer testified that he merely placed his hand on petitioner's shoulder with no malice and that he merely stated that he did not believe certain statements that the petitioner had made.

On Wednesday afternoon the questioning was begun again. Petitioner still denied guilt. Wednesday eve-

ning he finally broke. The sheriff was alone with petitioner late at night. He threatened to have petitioner's mother arrested for having stolen property. It was then that petitioner offered to make the confession that was eventually used against him. Petitioner made his confession, and he was then removed to the state penitentiary for protection.

These interrogations had been held in a small room eight feet by eleven. Small groups of different officers conducted these interrogations, which went on and on in the heat of the days and nights. But during this time he was denied counsel and access to family and friends.

This is another illustration of the use by the police of the custody of an accused to wring a confession from him. The confession so obtained from literate and illiterate alike should stand condemned. See *Haley* v. *Ohio,* 332 U. S. 596.

LUSTIG *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 1389, Oct. Term, 1946. Argued April 19, 1948.—Reargued October 19, 1948.—Decided June 27, 1949.

Notified by city police and a hotel manager that counterfeiting of currency apparently was being carried on in a hotel room for which petitioner and another were registered under assumed names, a Secret Service Agent went there and looked through the keyhole. He reported to the city police that he saw no evidence of currency counterfeiting but that he was confident that "something was going on." Suspecting that the occupants were counterfeiting race-track tickets and desiring to "get into that room and find out what was in there," city police obtained warrants for their arrest for violations of a city ordinance requiring "known criminals" to register with the police; entered the room in their absence; searched it; and found evidence of currency counterfeiting. The Secret Service Agent was not present when this took place; but he arrived later, examined the evidence, and was present when petitioner and his companion arrived and were arrested and searched by city police, who turned the articles evidencing counterfeiting of currency over to the Secret Service Agent. This evidence was admitted over petitioner's objection in his trial in a federal court and he was convicted for counterfeiting. *Held:* This evidence should not have been admitted and the conviction is reversed. Pp. 75–80.

159 F. 2d 798, reversed.

Petitioner's conviction of counterfeiting was affirmed by the Court of Appeals. 159 F. 2d 798. This Court denied certiorari, 331 U. S. 853, but, on rehearing, vacated that order and granted certiorari. 333 U. S. 835. *Reversed,* p. 80.

Edward Halle argued the cause and filed the briefs for petitioner.

Solicitor General Perlman argued the cause for the United States. With him on the brief on the original argument were *Assistant Attorney General Quinn, Robert S. Erdahl, Irving S. Shapiro* and *Philip R. Monahan.* With him on the brief on the reargument were *Assistant Attorney General Campbell, Mr. Erdahl* and *Josephine H. Klein.*

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join.

This is a prosecution under the counterfeiting statutes. Rev. Stat. § 5430, 35 Stat. 1088, 1116, 18 U. S. C. (1946 ed.) § 264 (now § 474). The sole question before us is the correctness of the denial of a pretrial motion, sustained by the Court of Appeals for the Third Circuit, 159 F. 2d 798, to suppress evidence claimed to have been seized in contravention of the Fourth Amendment as it is to be applied under the doctrine of *Byars* v. *United States,* 273 U. S. 28.[1]

Since the legal issue turns on the precise circumstances of this case they must be stated with particularity.

At about 2 p. m. on Sunday, March 10, 1946, Secret Service Agent Greene received two telephone calls, one from the police of Camden, New Jersey, the other from the manager of a hotel in that city, indicating violations of the counterfeiting statutes being carried on in Room 402 of the hotel. Lustig, the petitioner here, and one Reynolds were registered for this room under assumed

[1] After this Court denied a petition for writ of certiorari, a petition for rehearing was granted. The order entered June 16, 1947, 331 U. S. 853, denying certiorari was vacated and the petition for writ of certiorari to the Court of Appeals for the Third Circuit was granted on February 16, 1948. 333 U. S. 835.

names. It is to be noted that the Secret Service is the agency of the Government charged with enforcement of the laws pertaining to counterfeiting. On looking through the keyhole of the suspect room after reaching the hotel, Greene saw Lustig, two brief cases and a large suitcase, but no evidence pertinent to counterfeiting. He questioned the chambermaid whose suspicions had led to this investigation. She recounted the hearing of noises "like glass hitting against glass or metal hitting against metal" emanating from the suspect room. She also remarked that she had seen what looked like money on the table.

Greene thereupon reported to Detective Arthur of the Camden police at the Camden Police Station that he had seen no evidence of counterfeiting but was confident that "something was going on." Arthur reported the affair by telephone to his superior, Captain Koerner, at his home, who then came to the police station. In his account of the affair, Greene gave to Koerner the names under which the occupants of the room had registered. In reply to inquiry by Captain Koerner, Sergeant Murphy of the Camden police stated that one of the names was that of a "racehorse man or a tout or a bookie." After verifying the names on the hotel register and on the assumption that the occupants of the room "might be trying to counterfeit race-track tickets" rather than currency, Koerner secured warrants for the arrest of persons bearing the names on the register in order to "get into that room and find out what was in there." The offense charged against those bearing the assumed names was the violation of a Camden ordinance requiring "known criminals" to register with the local police within twenty-four hours after their arrival in town. At about four o'clock in the afternoon of the same day, Koerner and three city detectives secured a key from the manager of the hotel and entered Room 402. The police officers proceeded to empty the

bags and the drawers of a bureau and thus came upon the evidence sought to be suppressed. What they found indicated counterfeiting of currency rather than of race-track tickets.

During all this time, Greene had remained at police headquarters because he "was curious to see what they would find." On finding what they did find, Koerner sent word to Greene, who came to the hotel and examined the evidence in controversy. When Lustig and Reynolds eventually returned they were arrested and searched by the detectives. As various articles were taken out of their pockets, those deemed to have bearing on counterfeiting currency were turned over to Greene. He observed that the ink on a $100 bill taken from Reynolds had not been tampered with. Greene was trying to discover what had been used to make the impression on the "similitude" found in the room. After the search was completed, Greene and the city police gathered up the articles revealed by the search and carried them to the police station. Some of these articles were given to Greene before he left Room 402; all were eventually turned over to him.

We are confronted by a ruling of the District Court, sustained by the Court of Appeals, admitting the evidence. But the question before us is not foreclosed by the respect to be accorded to a ruling on an issue of fact by the trial court until analysis discloses that the ruling was merely on an issue of fact and that no issue of law was entwined in the ruling. Insofar as what the lower courts found as facts may properly be so regarded, they are to be accepted; but their constitutional significance is another matter.

On the basis of what was before him, the trial judge admitted the evidence because he did not "see any connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could

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not secure under the Federal law." We therefore accept as a fact that Greene did not request the search, that, beyond indicating to the local police that there was something wrong, he was not the moving force of the search, and that the search was not undertaken by the police to help enforcement of a federal law. But search is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense. Greene's selection of the evidence deemed important for use in a federal prosecution for counterfeiting, as part of the entire transaction in Room 402, was not severable, and therefore was part of the search carried on in that room. The uncontroverted facts show that before the search was concluded Greene was called in, and although he himself did not help to empty the physical containers of the seized articles he did share in the critical examination of the uncovered articles as the physical search proceeded. It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes the articles out of a bag. It would trivialize law to base legal significance on such a differentiation. Had Greene accompanied the city police to the hotel, his participation could not be open to question even though the door of Room 402 had not been opened by him. See *Johnson* v. *United States,* 333 U. S. 10. To differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in *Byars* v. *United States, supra,* 273 U. S. 28.

The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a

search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter. The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it. Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers. Evidence secured through such federal participation is inadmissible for the same considerations as those which made *Weeks* v. *United States*, 232 U. S. 383, the governing principle in federal prosecutions.

Though state officers preceded Greene in illegally rummaging through the bags and bureau drawers in Room 402, they concerned themselves especially with turning up evidence of violations of the federal counterfeiting laws after Greene joined them. He was an expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded. He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting. The fact that state officers preceded him in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course. Greene himself acknowledged such participation by his remark about "leaving the room after we had gathered all this evidence together."

Nor is the search here defensible as incidental to a lawful arrest. Greene never made the arrest, he knew that Lustig and Reynolds were not present when he entered their room and he had an active hand in the continuation

of the search without warrant before Lustig and Reynolds had returned. The ruling in *Davis* v. *United States,* 328 U. S. 582, does not come into play. Neither is it material that Greene may have been informed as to what he was likely to find before he joined the searchers. Vindicated anticipation of what an illegal search may reveal does not validate a search otherwise illegal. *Trupiano* v. *United States,* 334 U. S. 699, 708–9. With every respect for the rulings of the lower court, we find that the unquestioned facts disclose that the evidence on which the conviction rests was illicit and the motion to suppress it should have been granted.

Reversed.

MR. JUSTICE BLACK concurs in the judgment of the Court substantially for reasons set out in his dissent in *Feldman* v. *United States,* 322 U. S. 487, 494.

MR. JUSTICE MURPHY, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join, concurring.

MR. JUSTICE FRANKFURTER finds it unnecessary to decide whether an illegal search by state officers bars the introduction of the fruits of the search in a federal court. I join in his opinion, and in the judgment of reversal. But my dissenting views in *Wolf* v. *Colorado, ante,* p. 25, decided this day, make clear my position on the question he reserves. In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, dissenting.

My understanding of the rule as to the use of evidence in a federal criminal trial obtained by state officers through

a search and seizure conducted by them under state authority is this.

"While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." *Byars* v. *United States,* 273 U. S. 28, 32. In the *Byars* opinion this Court went on to say that the federal government had the right "to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure." P. 33. This is the rule which the Court reaffirms today.

It is the application of that rule to the facts of this case which causes me to dissent. Although it may seem only a difference of view as to the facts of a particular case, it becomes important in the administration of the criminal law. If federal peace officers are to be restricted in their duties to the extent indicated in the opinion, they should have full warning so that their work in detecting crime will not be frustrated through the officer's inadvertence in accepting evidence turned over to him by state officers. The trial court found that Greene did not participate in the search and seizure. We should accept that finding. If we undertake to reexamine the testimony to see whether there was participation by Greene, I should reach the same conclusion as the lower courts did.

In my view Secret Service Agent Greene did not participate in this search and seizure and the motion to suppress the evidence obtained was properly overruled in the trial court, and the trial court's action was properly sustained in the Court of Appeals for the Third Circuit.

The Court accepts "as a fact that Greene did not request the search, that, beyond indicating to the local police that there was something wrong, he was not the moving force of the search, and that the search was not undertaken by the police to help enforcement of a federal law." The record shows clearly to me that Agent Greene did not participate in the search and seizure.

Only state police entered the room of Lustig, opened his brief cases and found all the articles useful in counterfeiting. It was not until after all the articles were found that were offered in evidence that Agent Greene was called.[1] It was stated thus in the brief for appellant: "When he arrived at the hotel, all of the material that had been taken out of the brief case was on the bed. Capt. Koerner and Sgt. Murphy then put the exhibits back in the brief cases." This was Greene's testimony. Greene examined the articles that had been taken by the state police from the satchels. He then left the room and returned as Lustig and his companion Reynolds were in the act of opening the door to Room 402 where the state officers were. The state officers then arrested Reynolds and Lustig on a warrant for a state offense. The prisoners were searched. On Reynolds a $100 bill was found that was shown to Agent Greene by Captain

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[1] Testimony of Captain Koerner:

"Q. After you discovered these articles, what did you do?

"A. I called agent Greene, of the United States Secret Service.

. . . . . .

"Greene came over in the neighborhood of five o'clock after we made a thorough search and found all this evidence I have presented."

Testimony of Sergeant Murphy:

"Q. When did Mr. Greene come there?

"A. After we searched the room, seeing what was in it, and finding the three notes, I talked to Captain Koerner and I told him we had enough to charge him with a Federal violation, and I called Mr. Greene from the hotel and explained to him over the telephone just about what we had found, and he came over later."

Koerner.[2] The $100 bill had not been tampered with, was not evidence against Lustig and has nothing to do with the case against him.

Unless the fact that Agent Greene looked at the evidence secured by the state police before it was removed from the room involves the United States in the search and seizure, the lower courts were correct in holding that Agent Greene had no part in the search and seizure. Greene did not "share in the critical examination of the uncovered articles as the physical search proceeded."[3] The search had ended before he came into the room. The subsequent arrest, examination, and the $100 bill found on Reynolds had nothing to do with the alleged unlawful search and seizure. The search and seizure had run its course and we should not hold that the appearance of a federal officer at the place of unlawful search and seizure after evidence has been found makes him a participant in the act. This evidence should not be suppressed and the conviction of Lustig should be affirmed.

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[2] Testimony of Agent Greene:

"Q. There was a hundred dollar bill found on Mr. Reynolds?

"A. Well, a new one.

"Q. Did you match the hundred dollar bill with that impression?

"A. No, sir. I observed that the ink on this new hundred dollar bill had not been tampered with. In other words, the bill was new in appearance and I concluded it was not the pattern bill from which this hundred dollars was made.

"Q. You gave the hundred dollars did you to Mr. Reynolds?

"A. No, sir. At the time I looked at the bill it was in Captain Koerner's possession."

[3] Opinion of MR. JUSTICE FRANKFURTER, *ante*, p. 78.

CHRISTOFFEL *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 528. Argued April 20, 1949.—Decided June 27, 1949.

For alleged perjurious testimony before a Committee of the House of Representatives, petitioner was convicted under the perjury statute of the District of Columbia (§ 22–2501 of the D. C. Code), which makes it an essential element of the offense that it shall have been committed before "a competent tribunal." The Committee in question had a membership of twenty-five. Although evidence was adduced at the trial from which a jury might have concluded that, at the time of the alleged perjurious testimony, less than a quorum of the Committee were in attendance, the trial court in its charge allowed the jury to find a quorum present simply by finding that thirteen or more members were in attendance when the Committee was convened. *Held:* So much of the instructions to the jury as allowed them to find a quorum present without reference to the facts at the time of the alleged perjurious testimony was erroneous, and the judgment of conviction must be reversed. Pp. 85–90.

84 U. S. App. D. C. 132, 171 F. 2d 1004, reversed.

Petitioner was convicted of perjury under the perjury statute of the District of Columbia (§ 22–2501 of the D. C. Code), for alleged perjurious testimony before a Committee of the House of Representatives. The Court of Appeals affirmed the conviction. 84 U. S. App. D. C. 132, 171 F. 2d 1004. This Court granted certiorari. 336 U. S. 934. *Reversed,* p. 90.

O. John Rogge argued the cause and filed a brief for petitioner.

Assistant Attorney General Campbell argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Robert S. Erdahl, Harold D. Cohen* and *Philip R. Monahan.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

In March of 1947, the Committee on Education and Labor was, as it is now, a standing committee of the House of Representatives.[1] During the first session of the 80th Congress it held frequent hearings on proposed amendments to the National Labor Relations Act. On March 1, 1947, petitioner appeared as a witness before the committee, under oath, and in the course of the proceedings was asked a series of questions directed to his political affiliations and associations. In his answers he unequivocally denied that he was a Communist or that he endorsed, supported or participated in Communist programs. As a result of these answers he was indicted for perjury under § 22–2501 of the District of Columbia Code,[2] and after a trial by jury was convicted. The Court of Appeals affirmed the conviction, 84 U. S. App. D. C. 132, 171 F. 2d 1004, and we granted certiorari to review its validity. 336 U. S. 934.

No question is raised as to the relevancy or propriety of the questions asked. Petitioner's main contention is that the committee was not a "competent tribunal" within the meaning of the statute, in that a quorum of

[1] Legislative Reorganization Act of 1946, 60 Stat. 812, § 121; Rule X, House of Representatives; H. R. Res. No. 111, 80th Cong., 1st Sess., adopted Feb. 26, 1947 (93 Cong. Rec. 1457).

[2] "§ 22–2501 . . . . Perjury—Subornation of perjury. Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. . . ." 31 Stat. 1329.

the committee was not present at the time of the incident on which the indictment was based. As to this, the record reveals the following: the Committee on Education and Labor consists of twenty-five members, of whom thirteen constitute a quorum. At the commencement of the afternoon session on Saturday, March 1, 1947, shortly after two o'clock, a roll call showed that fourteen members were present. Petitioner's testimony started some time after four o'clock. The responses said to constitute offenses were given just prior to five p. m.

Evidence was adduced at the trial from which a jury might have concluded that at the time of the allegedly perjurious answers less than a quorum—as few as six—of the committee were in attendance. Counsel for the petitioner contended vigorously at the trial, on appeal and in this Court that unless a quorum were found to be actually present when the crucial questions were asked, the statutory requirement of a competent tribunal was not met and that absent such a finding a verdict of acquittal should follow.

The trial court agreed that the presence of a quorum was an indispensable part of the offense charged, and instructed the jury that to find the defendant guilty they had to find beyond a reasonable doubt "That the defendant Christoffel appeared before a quorum of at least thirteen members of the said Committee," and that "at least that number must have been actually and physically present . . . . If such a Committee so met, that is, if 13 members did meet at the beginning of the afternoon session of March 1, 1947, and thereafter during the progress of the hearing some of them left temporarily or otherwise and no question was raised as to the lack of a quorum, then the fact that the majority did not remain there would not affect, for the purposes of this case, the existence of that Committee as a competent tribunal provided that before the oath was administered

and before the testimony of the defendant was given there were present as many as 13 members of that Committee at the beginning of the afternoon session. . . ."

This charge is objected to insofar as it allows the jury to find a quorum present simply by finding that thirteen or more members were in attendance when the committee was convened, without reference to subsequent facts.

The Constitution of the United States provides that "Each House may determine the Rules of its Proceedings," Art. I, § 5, Cl. 2, and we find that the subject of competency, both of the House as a whole and of its committees, has been a matter of careful consideration. Rule XI (2) (f) of the House of Representatives reads in part, "The rules of the House are hereby made the rules of its standing committees so far as applicable . . . ." Rule XV of the House provides for a call of the House if a quorum is not present, and it has been held under this rule that such a call, or a motion to adjourn, is the only business that may be transacted in the absence of a quorum. IV Hind's Precedents § 2950; *id.* § 2988. See *id.* §§ 2934, 2939; VI Cannon's Precedents § 653; *id.* § 680. It appears to us plain that even the most highly privileged business must be suspended in the absence of a quorum in the House itself.

A similar situation obtains in the committees.[3] The Legislative Reorganization Act of 1946, 60 Stat. 812, 831, provides, referring to the standing committees, in § 133 (d), "No measure or recommendation shall be reported from any such committee unless a majority of the commit-

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[3] There is some difference between procedure in the full House and in its committees. In the former, business is transacted on the assumption that a quorum is present at all times, unless a roll call or a division indicate the contrary. In committee meetings, however, the presence of a quorum must be affirmatively shown before the committee is deemed to be legally met. VIII Cannon's Precedents § 2222.

tee were actually present." The rule embodied in this subsection was effective as long ago as 1918 to keep off the floor of the House a bill from a committee attended by less than a quorum, even though no objection was raised in the committee meeting itself. It appeared that the situation in the committee was much like the one with which we are concerned, with members coming and going during the meeting. No point of no quorum was raised at the committee meeting. When the Chairman proposed in the House to bring up the bill considered in the meeting, the Speaker ruled, on objection being made from the floor, that in spite of the point's not having been raised in committee, the bill could not be reported. The absence of a quorum of the committee, though at the time unobjected to, had made effective action impossible. VIII Cannon's Precedents § 2212. Witnesses in committee hearings cannot be required to be familiar with the complications of parliamentary practice. Even if they are, the power to raise a point of no quorum appears to be limited to members of the committee. We have no doubt that if a member of the committee had raised a point of no quorum and a count had revealed the presence of less than a majority, proceedings would have been suspended until the deficiency should be supplied. In a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one for petitioner to raise the question.

Congressional practice in the transaction of ordinary legislative business is of course none of our concern, and by the same token the considerations which may lead Congress as a matter of legislative practice to treat as valid the conduct of its committees do not control the issue before us. The question is neither what rules Congress may establish for its own governance, nor whether presumptions of continuity may protect the validity of its legislative conduct. The question is rather what rules

the House has established and whether they have been followed. It of course has the power to define what tribunal is competent to exact testimony and the conditions that establish its competency to do so. The heart of this case is that by the charge that was given it the jury was allowed to assume that the conditions of competency were satisfied even though the basis in fact was not established and in face of a possible finding that the facts contradicted the assumption.

We are measuring a conviction of crime by the statute which defined it. As a consequence of this conviction, petitioner was sentenced to imprisonment for a term of from two to six years. An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt. An element of the crime charged in the instant indictment is the presence of a competent tribunal, and the trial court properly so instructed the jury. The House insists that to be such a tribunal a committee must consist of a quorum, and we agree with the trial court's charge that, to convict, the jury had to be satisfied beyond a reasonable doubt that there were "actually and physically present" a majority of the committee.[4]

[4] In *Meyers* v. *United States*, 84 U. S. App. D. C. 101, 171 F. 2d 800, the appellant made contentions similar to those of petitioner. The Court of Appeals for the District of Columbia Circuit held the same view expressed here. "On October 6, 1947, however, only two senators were present at the hearing. Since they were a minority of the subcommittee, they could not legally function except to adjourn. For that reason, the testimony of Lamarre given on that day cannot be considered as perjury nor can appellant be convicted of suborning it." 84 U. S. App. D. C. at 112, 171 F. 2d at 811. The conviction was affirmed on the ground that all the perjurious statements alleged in the indictment were made on October 4, when a quorum was present. 84 U. S. App. D. C. at 113, 171 F. 2d at 812.

Then to charge, however, that such requirement is satisfied by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed. This not only seems to us contrary to the rules and practice of the Congress but denies petitioner a fundamental right. That right is that he be convicted of crime only on proof of all the elements of the crime charged against him. A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction. The Court of Appeals erred in affirming so much of the instructions to the jury as allowed them to find a quorum present without reference to the facts at the time of the alleged perjurious testimony, and its judgment is reversed.

Reversed.

MR. JUSTICE JACKSON, dissenting.

THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE BURTON and I think the Court is denying to the records of the Congress and its Committees the credit and effect to which they are entitled, quite contrary to all recognized parliamentary rules, our previous decisions, and the Constitution itself.

No one questions that the competency of a Committee of either House of Congress depends upon the action of the House in constituting the Committee, and in determining the rules governing its procedure. Nor does any one deny that each House has the power to provide expressly that a majority of the entire membership of any of its Committees shall constitute a quorum for certain purposes, and that for other purposes a different number shall be sufficient. For example, either House may provide expressly that, for the purpose of convening a session of a Com-

mittee or of approving a report, a majority of the Committee's entire membership shall be necessary; and that, for the purpose of taking sworn testimony, one or more Committee members shall be sufficient to constitute a quorum. Similarly, each House may spell out a formal rule that a Committee shall constitute a competent tribunal to take sworn testimony if a majority of its members shall be present at the beginning of the session at which the testimony is taken, and that such competency shall continue although the attendance of Committee members may drop, during the Committee's session, to some smaller number. The reasonableness of such a rule is apparent because the value of the testimony taken by such a Committee is measured not so much by the number of people who hear it spoken at the session as it is by the number and identity of those who read it later.

But what Congress may do by express rule it may do also by its custom and practice. There is no requirement, constitutional or otherwise, that its body of parliamentary law must be recorded in order to be authoritative. In the absence of objection raised at the time, and in the absence of any showing of a rule, practice or custom to the contrary, this Court has the duty to presume that the conduct of a Congressional Committee, in its usual course of business, conforms to both the written and unwritten rules of the House which created it. "Each House may determine the Rules of its Proceedings, ..." Art. I, § 5, cl. 2. This Court accordingly can neither determine the rules for either House of Congress nor require those rules to be expressed with any degree of explicitness other than that chosen by the respective Houses.

The record shows a quorum of this Committee present when the session began, and neither Christoffel nor anyone else had raised the point of no quorum up to the time he gave false testimony. On trial for perjury he introduced oral testimony tending to show that, at the moment

he so testified, less than a quorum were actually present. The trial court charged that, in the absence of challenge or proof to the contrary, the quorum established at the beginning of the session is presumed to continue and the jury could find Christoffel guilty of perjury if he gave false testimony before such a body. He was found guilty. The Court now holds the charge was erroneous and that, if the Government cannot show positively that there was a quorum present when he falsified, the Committee was not a "competent tribunal" within the Perjury Statute of the District and his conviction thereunder is invalid.

Thus the issue is not whether a quorum is required in order for the Committee to be a competent tribunal, but whether committee rules, practices and records, and congressional rules, practices and records in analogous situations, are subject to attack by later oral testimony and to invalidation by the courts.

All the parliamentary authorities, including those cited by the Court, agree that a quorum is required for action, other than adjournment, by any parliamentary body; and they agree that the customary law of such bodies is that, the presence of a quorum having been ascertained and recorded at the beginning of a session, that record stands unless and until the point of no quorum is raised. This is the universal practice. If it were otherwise, repeated useless roll calls would be necessary before every action.

In this case, therefore, the record on the subject of quorum was entitled to full credit. Christoffel himself did not, during his testimony, raise the question of no quorum. Whether one not a member of the body would have been permitted to do so and what effect it would have, had he been refused, we need not decide. The fact is, he made no effort to raise the point. To have then even suggested the objection would have given opportunity to the Committee to correct it. And if there were not enough committee members present to make a

legal body, he would be at liberty, if his objection were overruled, to walk out. Instead, he chose to falsify to the Committee and now says that, despite the record, he should be allowed to prove that not enough members were present for his lie to be legal perjury. The Court agrees and holds that the House Rules requiring a quorum for action require this result. Since the constitutional provision governing the House itself also requires a quorum before that body can do business, this raises the question whether the decision now announced will also apply to the House itself. If it does, it could have the effect of invalidating any action taken or legislation passed without a record vote, which represents a large proportion of the business done by both House and Senate. The effect is illustrated by noting that such a rule would make possible the invalidation of not only this conviction for perjury, but the Perjury Act[1] itself, as well as the Judicial Code,[2] which is now the source of this Court's authority to review the conviction. Moreover, this rule is in direct contravention of the Constitution, which does not require either House or Senate, much less a Committee, to take a record vote except[3] "at the Desire of one fifth of those Present." Art. I, § 5, cl. 3.

The Court significantly omits citation of any prior decision in support of its present conclusion.[4] The reason

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[1] Passed without record vote by the Senate, 34 Cong. Rec., Pt. 4, pp. 3496–97, and by the House without a record vote, 34 Cong. Rec., Pt. 4, p. 3586.

[2] Passed by the Senate without a record vote, 94 Cong. Rec., Pt. 6, p. 7930, and motion to reconsider withdrawn, 94 Cong. Rec., Pt. 7, p. 8297. Passed by the House without a record vote, 94 Cong. Rec., Pt. 7, p. 8501.

[3] A separate provision requires a record vote on the question of overriding a Presidential veto. Art. I, § 7, cl. 2.

[4] This is not because others have not tried to raise the issue. In *Meyers* v. *United States*, 84 U. S. App. D. C. 101, 171 F. 2d 800, certiorari denied 336 U. S. 912, the petitioner was convicted of subornation of perjury committed before a Committee of Congress on two

is fairly clear—the others are inconsistent with this one. For example, in *United States* v. *Ballin,* 144 U. S. 1, we held it to be within the competency of the House to prescribe any method reasonably certain to ascertain the

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separate days—October 4 and October 6. The conviction was allowed to stand despite a charge to the jury that the quorum on October 4 was presumed to continue unless and until a committee member raised the point of no quorum, and that false testimony given before the point is raised is perjurious under this same statute. That charge is practically identical with the charge given in this case, of which this Court now says: "The heart of this case is that by the charge that was given it the jury was allowed to assume that the conditions of competency were satisfied even though the basis in fact was not established and in face of a possible finding that the facts contradicted the assumption." This perfectly describes the *Meyers* case, considering only the October 4th testimony, on which it is said the conviction rested. Considering only that part of each count, Meyers was convicted and is now imprisoned for suborning perjury given under identical conditions as did Christoffel; and Meyers' guilt was determined by a jury which received the same ruling the Court now holds to be error as applied to Christoffel. Yet the Meyers conviction was affirmed and we denied his plea for review. Such a denial here of course does not imply approval of the law announced below but, on the undisputed facts, Meyers' conviction rests on a basis which this Court says is "unthinkable" as to Christoffel, whose conviction is reversed.

Moreover, the Meyers jury was permitted to convict, partly at least, on the basis of testimony given before a Committee on October 6 when the *committee records showed, and the Government admits, that no quorum was present at any time.* Today's opinion is diametrically opposed to the Meyers conviction based on the October 4th testimony alone, but the Meyers conviction also rests in part on testimony before a body which demonstrably and admittedly *never* amounted to a quorum, while Christoffel's is reversed merely because the charge permitted the jury to ignore oral testimony "indicating" that a quorum once admittedly established may have evaporated. I do not see how the Court can justify such discrimination. The court below evidently could not, for it relied on the *Meyers* case as a precedent for affirming the conviction of Christoffel on this identical issue. 84 U. S. App. D. C. 132, 133, 171 F. 2d 1004, 1005, n. 1.

fact of a quorum; that the courts are not concerned with the wisdom or advantages of any such rule—"with the courts the question is only one of power." The House has adopted the rule and practice that a quorum once established is presumed to continue unless and until a point of no quorum is raised. By this decision, the Court, in effect, invalidates that rule despite the limitations consistently imposed upon courts where such an issue is tendered. See *Field* v. *Clark,* 143 U. S. 649, 669–673; *United States* v. *Ballin,* 144 U. S. 1, 5; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 143; cf. *Leser* v. *Garnett,* 258 U. S. 130, 137. And see *Coleman* v. *Miller,* 307 U. S. 433, 453–456; and concurring opinions at 307 U. S. 456–460, and 460–470.

We do not think we should devise a new rule for this particular case to extend aid to one who did not raise his objection when it could be met and who has been prejudiced by absence of a quorum only if we assume that, although he told a falsehood to eleven Congressmen, he would have been honest if two more had been present. But in no event should we put out a doctrine by which every Congressional Act or Committee action, and perhaps every judgment here, can be overturned on oral testimony of interested parties.

We should affirm the conviction.

SECURITIES AND EXCHANGE COMMISSION *v.* CENTRAL-ILLINOIS SECURITIES CORP. ET AL.

NO. 226. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued January 12–13, 1949.—Decided June 27, 1949.

The Securities and Exchange Commission approved as fair and equitable an amended plan for dissolution submitted under § 11 (e) of the Public Utility Holding Company Act of 1935 by a solvent holding company whose capital structure consisted of three classes of preferred and one class of common stock. The plan provided for payment to the preferred stockholders in cash; distribution of the remaining assets to the common stockholders; and dissolution of the company. The preferred stockholders were to be paid the voluntary liquidation values (or call prices) fixed by the charter ($105, $110, and $110, respectively), which the Commission found to bc less than their going-concern or investment values but which were more than their charter values on involuntary liquidation ($100 for each of the three classes). On application by the Commission for enforcement of the plan, the District Court concluded that it would not be fair and equitable to pay the preferred stockholders more than $100 per share, ordered the plan modified to provide for such payment, and approved the plan as thus modified. *Held:* The Commission's approval of the plan was not contrary to law; its findings were supported by adequate evidence; and its order should have been approved and enforced. Pp. 99–113, 155.

1. The Commission's findings as to valuation, which are based upon expert judgment, discretion and prediction, as well as upon "facts," are not subject to reexamination on judicial review in a proceeding under § 11 (e), unless they are not supported by substantial evidence or were not made in accordance with legal standards. Pp. 113–127.

(a) The scope of judicial review over findings of fact and over determinations in matters in which Congress has given the

*Together with No. 227, *Streeter et al.* v. *Central-Illinois Securities Corp. et al.*; No. 243, *Home Insurance Co. et al.* v. *Central-Illinois Securities Corp. et al.*; and No. 266, *Central-Illinois Securities Corp. et al.* v. *Securities and Exchange Commission et al.*, also on certiorari to the same Court.

Commission authority to act upon its expert knowledge and experience is not different in a proceeding under § 11 (e) from that in a proceeding under § 24 (a). Pp. 113–127.

(b) The characterization of the reviewing court in § 11 (e) as "a court of equity" was not intended to define the scope of review to be exercised over findings of fact or determinations in matters committed to the Commission's expert judgment and discretion, or to set up a different and conflicting standard of review from the one to be applied in proceedings under § 24 (a). P. 125.

2. The equitable equivalents of the securities' investment values on a going-concern basis, rather than charter liquidation provisions, provide the measure of stockholders' rights in liquidations compelled by the Act. *Otis & Co.* v. *Securities & Exchange Comm'n*, 323 U. S. 624; *Schwabacher* v. *United States*, 334 U. S. 182. Pp. 129–135.

(a) The "fair and equitable" standard requires that each security holder be given the equitable equivalent of the rights surrendered; in liquidations under the Act, equitable equivalence is determined, not by charter preferences, but by valuing the security surrendered "on the basis of a going business and not as though a liquidation were taking place." Pp. 130–131.

(b) There is no significant difference between the charter provisions in this case and those in the *Otis* case. Pp. 131–132.

(c) The fact that in this case there is a dissolution of the holding company enterprise by the liquidation of the last holding company in the system, whereas in the *Otis* case the holding company system was to continue, does not require that the charter involuntary liquidation preference replace investment values as the measure of the preferred stockholders' rights. *Schwabacher* v. *United States*, 334 U. S. 182. Pp. 132–135.

(d) A different result is not required by the fact that the plan provides for payment of the preferred stockholders in cash rather than in securities of a new corporation. P. 135.

(e) The doctrine of impossibility or frustration does not provide a measure of the security holders' claims. Pp. 136–139.

3. The Commission's application of the investment value principle was free from errors of law; and the findings with respect to value were based upon substantial evidence. Pp. 139–152.

(a) The principle of compensating security holders by allowing them the equitable equivalent of the present going-concern value of their securities as the measure of security satisfaction did

not, and was not intended to, destroy the charter right to priority of satisfaction. P. 140.

(b) When the Commission values a security interest by determining the value that interest would have if it were not for the present liquidation required by the Act, it substantially complies with the statutory mandate. Pp. 140–143.

(c) When the claims of senior security holders are to be paid in cash, the Commission properly measures their claims in terms of the cost of reinvestment in a security of comparable risk and return. P. 144.

(d) When it became apparent that the going-concern value would exceed the call prices of the stocks by a considerable amount, the exact going-concern value became immaterial, because the call price (at which the corporation could always retire the preferred stock without reference to the Act) marked the limits of the preferred stocks' claims. P. 145.

(e) The Commission's determination that the investment values of the preferred stocks were in excess of their call prices has ample support in the record. Pp. 144–148.

(f) The Commission did not give the common stockholders less than the investment value of their stock. Pp. 148–151.

(g) Since the amended plan required the investment value of the preferred stock to be measured by cash in this case, there is no occasion for examination of the correlative rights of the preferred and common stockholders; the rights of the common stockholders are not entitled to recognition until the rights of the preferred stockholders have been fully satisfied. P. 151.

(h) In deciding the case on the assumption that the inquiry was one of "relative rights based on colloquial equity," the District Court erred insofar as by "colloquial equities" it meant considerations which do not bear upon the investment or going-concern value the preferred stocks would have absent the liquidation compelled by the Act. Pp. 151–152.

4. The escrow arrangement adopted by the District Court, whereby there would be deposited in escrow the difference between the involuntary liquidation price of $100 per share and the amount which the Commission approved, was fair to the preferred stockholders. Pp. 152–155.

168 F. 2d 722, reversed.

A plan under § 11 (e) of the Public Utility Holding Company Act of 1935 was approved by the Securities and Exchange Commission. Holding Company Act Releases

Nos. 7041, 7119, and 7190. The District Court modified the plan and approved it as modified. 71 F. Supp. 797. The Court of Appeals vacated the decree of the District Court, with directions to remand to the Commission. 168 F. 2d 722. This Court granted certiorari. 335 U. S. 851. *Reversed and remanded,* p. 155.

Roger S. Foster argued the cause for the Securities & Exchange Commission. With him on the brief were *Solicitor General Perlman, Robert L. Stern, Harry G. Slater, Jerome S. Katzin* and *Myer Feldman.*

Lawrence R. Condon argued the cause for Streeter et al., petitioners in No. 227 and respondents in No. 266. With him on the brief was *Milton Maurer.*

Francis H. Scheetz argued the cause and filed a brief for the Home Insurance Co. et al., petitioners in No. 243 and respondents in No. 266.

Alfred Berman argued the cause for the Central-Illinois Securities Corp. et al., petitioners in No. 266 and respondents in Nos. 226, 227 and 243. With him on the brief were *Abraham Shamos, J. Howard Rossbach, Philip W. Amram* and *Herbert L. Cobin.*

Louis Boehm argued the cause for White et al., respondents. With him on the brief was *Raymond L. Wise.*

W. E. Tucker and *Paul D. Miller* were counsel for the Engineers Public Service Co.

Mr. Justice Rutledge delivered the opinion of the Court.

This case involves an amended plan filed under § 11 (e) of the Public Utility Holding Company Act of 1935 [1] by Engineers Public Service Company. The plan provided, *inter alia,* for satisfying the claims of Engineers' preferred stockholders in cash as a preliminary to distributing the

[1] 49 Stat. 803, 822, 15 U. S. C. § 79k (e).

remaining assets to common stockholders and dissolving the company. Broadly, the question is whether the Securities and Exchange Commission, in reviewing the plan, correctly applied the "fair and equitable" standard of § 11 (e) in determining the amounts to be paid the preferred stockholders in satisfaction of their claims.

As will appear, the ultimate effect of the Commission's determination was to allow the holders of the three series of Engineers' outstanding cumulative preferred stock to receive the call (or voluntary liquidation and redemption) prices for their shares, namely, $105 per share, $110 per share and $110 per share, rather than the involuntary liquidation preference which, for each of the three series, was $100 per share. Common shareholders oppose the allowance to the preferred of the call price value, insisting that the maximum to which the preferred are entitled is the involuntary liquidation preference of $100.

In this view the District Court and, generally speaking, the Court of Appeals have concurred, declining to give effect to the plan as approved in this respect by the Commission. Consequently we are confronted not only with issues concerning the propriety of the Commission's action in applying the "fair and equitable" standard of § 11 (e), but with the further question whether its judgment in these matters is to be given effect or that of the District Court, either as exercised by it or as modified in certain respects by the Court of Appeals.

The facts and the subsidiary issues involved in the various determinations are of some complexity and must be set forth in considerable detail for their appropriate understanding and disposition.

At the time the Public Utility Holding Company Act was enacted, the holding company system dominated by Engineers consisted of 17 utility and nonutility compa-

nies. Of these, nine were direct subsidiaries of Engineers and eight were indirect subsidiaries. Integration proceedings under § 11 (b) (1) of the Act were instituted with respect to Engineers and its subsidiaries in 1940. In a series of orders issued in 1941 and 1942 the Securities and Exchange Commission directed Engineers to dispose of its interests in all companies except either Virginia Electric and Power Company or Gulf States Utilities Company, and designated Virginia as the principal system if Engineers failed to elect between it and Gulf States.[2] At the time the plan now under review was filed Engineers had complied with the divestment orders to the extent of disposing of all its properties except its interest in Virginia, consisting of 99.8 per cent of that company's common stock, and its interest in Gulf States and El Paso Electric Company, consisting of all their common stock. Engineers' principal assets were the securities representing its interest in these companies and $14,650,000 in cash and United States Treasury securities.

Engineers had no debts. It had outstanding three series of cumulative preferred stock of equal rank: 143,951 shares of $5 annual dividend series, 183,406 shares of $5.50 series, and 65,098 shares of $6 series. As has been said,

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[2] *Engineers Public Service Co.*, 9 S. E. C. 764; *The Western Public Service Co.*, 10 S. E. C. 904; *Engineers Public Service Co.*, 12 S. E. C. 41; *Engineers Public Service Co.*, 12 S. E. C. 268. The latter two orders were reviewed on the petition of Engineers by the Court of Appeals for the District of Columbia, which, on November 22, 1943, set aside those orders and remanded the case to the Commission for further proceedings in accordance with its opinion. *Engineers Public Service Co.* v. *Securities and Exchange Commission*, 78 U. S. App. D. C. 199, 138 F. 2d 936. On the applications of both Engineers and the Commission, this Court granted certiorari. 322 U. S. 723. We were prevented by lack of a quorum from deciding the case, and when we were advised that the partial consummation of the plan now under consideration rendered the question moot, we ordered the decision of the Court of Appeals vacated. 332 U. S. 788.

all three series had involuntary liquidation preferences of $100 per share, call prices of $105 for the $5 series and $110 for the $5.50 and $6 series, and voluntary liquidation preferences equal to the call prices.

Proceedings before the Commission. The Plan as Originally Filed. The plan as originally filed by Engineers provided for the retirement of all three series of preferred stock by payment of the involuntary liquidation preference of $100 per share, plus accrued dividends to the date of payment.[3] The remaining properties of Engineers were then to be distributed among the common stockholders, and Engineers was to dissolve.[4]

In order to insure adequate presentation of the views of the preferred stockholders, Engineers' board of directors authorized one of its members, Thomas W. Streeter, who was primarily interested in the preferred stock, to retain counsel partly at the company's expense. Streeter and members of his family are petitioners in No. 227. These preferred stockholders and representatives of a group of institutional investors who held preferred stock,

[3] The cash with which the preferred was to be paid was to consist of treasury cash on hand, cash obtained by a short-term bank loan, and $21,964,632 in cash which Engineers' common stockholders were to pay into the company's treasury in exchange for warrants entitling them to purchase one share of Gulf States' common stock at $11.50 per share, for each share of Engineers owned. The provision for the bank loan was deleted from the amended plan, by requirement of the Commission, and the cash which would have been thus obtained was to be obtained from special dividends declared by the three operating subsidiaries.

[4] After retirement of the preferred, the common stock of El Paso and Virginia (the two remaining companies whose common stock was owned by Engineers) was to be distributed among the 13,000 common stockholders of Engineers as a final liquidation dividend, after which Engineers and the system's service company were to dissolve.

the Home Insurance Company and Tradesmens National Bank and Trust Company, petitioners in No. 243, appeared before the Commission in opposition to the plan. They contended that they should receive amounts equal to the voluntary liquidation preference of the preferred.

After summarizing the issuing prices,[5] the dividend history,[6] and the market history[7] of the three series of preferreds, the Commission analyzed the assets coverage and earnings coverage of the stock. The preferred stock of Engineers represented 17.5 per cent of the consolidated capitalization and surplus of the system. That stock was junior to the 66.2 per cent of the consolidated capitalization and surplus which consisted of securities of Engineers' subsidiaries held by the public, and senior to 16.3 per cent,

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[5] The $5 series was issued in March, 1928, and was sold, with a conversion privilege which had since expired, to the public at $100 per share. The $5.50 preferred was issued in October of the same year and was sold, with warrants (inoperative at the time the plan was proposed) entitling holders to purchase common stock, to the public at $99.50 per share. The $6 series was issued in September, 1930, and sold to the public at $100.

[6] Except for the period from July 1, 1933, to July 31, 1936, dividends on the preferred stock were never in arrears. The arrearages for this single period of delinquency were satisfied in 1936 and 1937.

[7] "The $5.00 series reached a high of $123.00 in 1929; its average price with the conversion privilege was $60.94; and $80.50 since the expiration of that privilege, its overall average since issue is $67.16. The $5.50 series had an average of $53.98 while its warrant right existed, and an average of $85.23 since; it reached a high of $109.00 in 1929, and its overall average since issue is $64.52. The $6.00 preferred reached its highest market price in 1945; its average price since issue is $62.77. As of February 13, 1946, the latest date covered in the hearings, the $5.00 series was selling at 105⅛, the $5.50 series at 105¾, and the $6.00 series at 109.

"Engineers common, issued in 1925, reached a high of 79⅝ in 1929 and a low of 1⅛ in 1935. On February 13, 1946 it was selling at 36." Holding Company Act Release No. 7041, p. 27, n. 45. Quotations in the text through note 11 are from this Release unless otherwise indicated.

consisting of Engineers' total common stock and surplus.

The system's average earnings coverage of fixed charges and preferred dividends for the last five years prior to the submission of the plan was 1.4 times. For these five years Engineers' average earnings coverage of preferred dividends was 1.5 times.

Certain expert testimony concerning the going-concern or investment value of the preferred stock was adduced before the Commission. Dr. Ralph E. Badger was an expert witness on behalf of certain preferred stockholders. He made a detailed analysis of the earnings and assets of Engineers and of the three series of preferred stock. He then compared Engineers and the preferred stock with relevant information concerning other comparable companies and securities.[8] He concluded that, apart from

[8] The Commission summarized Badger's testimony as follows: "After analyzing the earnings and assets of Engineers, he [Badger] selected for comparison the preferred stocks of five public utility holding companies which he believed to be similar to Engineers. These companies were compared with Engineers for the years 1940 to 1945 with reference to 'times all charges and preferred dividends earned,' 'proportion of prior obligations to total capitalization,' 'book value of equity per share of preferred,' 'percent of net quick assets to prior obligations' and 'times parent company dividends were earned.' It appeared that in general the position of Engineers' preferred was somewhat below the average of the five other companies until the disposition of Puget Sound in 1943. As a consequence of that disposition, its position improved to slightly over the average for those companies. Badger concluded that on an overall basis Engineers was in a median or average position as compared to the five companies studied. On the basis of a comparison of the yields of the five securities studied, he concluded that the $5.00 preferred of Engineers had an average value of $107.49 a share, the $5.50 preferred an average value of $118.31 a share, and the $6.00 preferred an average value of $129.07 a share.

"Badger also prepared a study of the preferred stocks of ten operating and holding companies selected for the similarity of their earnings to those of Engineers. These companies on an average earned all charges and preferred dividends 1.49 times in 1943, as

their call provisions and on the basis of quality and yield, the three series of preferred stock should be valued at $108.70, $119.57, and $130.33 respectively, but that because of the redemption privilege, "the present investment values are represented by their call price, plus a slight premium to account for the time required to effect a call." The fair investment values of the preferred, in view of the redemption privilege, were: $5 series—$106.25; $5.50 series—$111.38; $6 series—$111.50. No rebuttal testimony was introduced, and there was no serious challenge to Badger's conclusions that the fair investment value of each series of the preferred exceeded the call prices.

Donald C. Barnes, Engineers' president, testified that apart from the impact of § 11 of the Act and taking into account the call prices, the fair value of the preferreds, *i. e.*, "what a willing buyer would pay and what a willing seller would take in today's market for such securities," was somewhat above the redemption prices. Barnes spoke of several factors, *viz.*, possibilities of continued inflation, of depression, government competition, adverse changes in regulatory policy, or developments in atomic

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against 1.40 times for Engineers. In 1944 they earned overall charges 1.48 times, as against 1.54 times for Engineers. They covered preferred dividends, 2.52 times in 1943, as against 2.48 for Engineers, and in 1944 covered preferred dividends 2.46 times, as against a similar coverage of 3.20 for Engineers. The stocks selected sold at prices to yield between 3.9 and 5.4%, or an average yield for the ten stocks of 4.5%. Badger applied this yield to the several classes of Engineers' preferred and obtained corresponding values of $111.11 for the $5.00 preferred, $122.22 for the $5.50 preferred, and $133.33 for the $6.00 preferred. Badger concluded, however, that in his opinion, and in view of the 'investment characteristics' of the company and the conditions of the money market, a proper yield for the Engineers preferred, absent a call price, would be 4.6%, so that the corresponding investment worth per share of the three series would be . . . ." the amounts stated in the text. Holding Company Act Release No. 7041, p. 30.

energy, all "common to the utility industry generally," which might have a future adverse effect on the value of Engineers preferred. Both witnesses agreed, however, as Engineers stated in its brief before the Commission, that "the present value or investment worth of these three series of stock, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities" was in excess of the call prices. Barnes also testified that the preferred stock would have been called if it had not been for the impact of § 11.

The Commission first held that "the dissolution of Engineers [was] 'necessary' under the standards of the Act." However, since such a liquidation, under *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, "does not mature preferred stockholders' claims," the so-called involuntary liquidation provision of Engineers' charter was not operative. The *Otis* case ruled "that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors." 323 U. S. at 638.

After announcing that in a § 11 reorganization "a security holder must receive, in the order of his priority, from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered," the Commission considered all the charter provisions which affected the preferred, "such as the dividend rate and the call price as well as the liquidation preferences," and analyzed the financial condition of the company "with particular regard to the asset and earnings coverage of the preferred." On the basis of the undisputed testimony the Commission found that the going-concern or investment value of the preferred was at least equal to the respective call prices. Since the call prices operated as ceilings on the value of the security by providing with respect to each

series, "a means, apart from the Act, whereby the security can be retired at a maximum price," [9] no attempt was made to determine whether the investment value of any series of preferred would exceed the call price if there were no call provision.

The Commission concluded that the payment of only $100 per share, plus accrued dividends, would not be fair and equitable to the preferred stockholders. It therefore refused to approve that provision of the plan which provided for retirement of the preferred at involuntary liquidation preferences.

Turning its attention to whether the plan was fair to the common stock, the Commission stated that, because of the accumulation of large amounts of idle cash,[10] elimination of preferred stock having fixed dividend requirements was "highly beneficial to the common." Moreover, by implementing adjustment of the system to compliance with the Act, retirement of the preferred brought the common closer to the time when it would begin receiving dividends.

Engineers contended that payment to the preferred of any amount in excess of $100 per share was unfair, because certain divestments required by the Act resulted in losses to the common stock and also eliminated the advantages of a "diversified portfolio of securities." In reply to this the Commission noted that it did not accept

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[9] The Commission cited several of its previous opinions for support of this result: *Buffalo, Niagara & Eastern Power Corp.*, Holding Co. Act Release No. 6083; *New England Power Association,* Holding Company Act Release No. 6470; *American Power & Light Co.,* Holding Company Act Release No. 6176.

[10] At the time of the hearings the company had on hand in its treasury some $14,650,000 in idle cash, and it was estimated that by the end of 1946 this sum would reach $16,825,000. These funds had accumulated from property dispositions and retained earnings, the management having pursued a policy of withholding dividends on the common until it was satisfied that the system had made the adjustments required by the Act.

the hypothesis that losses were incurred by divestments caused by the Act,[11] and stated that the preferred claims, measured by their going-concern value, were entitled to absolute priority, and that what remained to junior security holders after satisfying this priority was necessarily their fair share.

Certain mechanical features of the plan were also disapproved by the Commission.[12]

The Amended Plan. Engineers then acquiesced in the Commission's determination and submitted an amended plan. In addition to meeting the Commission's mechanical objections to the original plan, the amended plan pro-

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[11] The Commission observed: "In all of its divestments, Engineers has been free in its choice of methods, and, within limits, to choose the time for divestment. All sales have been negotiated by Engineers at arm's-length. If, as in the case of Puget Sound, the sale brought less than the carrying value on the books of Engineers, the indication is that the carrying value was excessive and not that the sales price was low. It is significant that the market price of Engineers' common when the plan was filed was the highest since 1932 and that the price has been rising steadily since 1942 when the program of simplification got under way. . . . Engineers' common reached a low of 1⅛ in 1935. By 1945, when the plan was filed, it had reached a high of 37." Holding Company Act Release No. 7041, p. 34, n. 55. See also note 38 *infra.*

[12] The bank loan which the plan proposed in order to raise cash with which to pay off the preferred was found by the Commission to be unnecessary. See note 3 *supra.* Retention of $65,000,000 of Virginia stock by a trusteeship arrangement which necessitated retention of a large part of Engineers' staff was found unnecessary. All stock of Virginia could be distributed immediately upon payment of the preferred at $100 per share and creation of an appropriate escrow to protect the preferred shareholders' rights to additional payments found due. The plan was also found "incomplete and unfair" because it failed to include a provision for supervision by the Commission over the payment of fees and expenses incurred in connection with the plan.

vided for payment of the preferred stocks at their voluntary liquidation or call prices.

Over the objections of certain common stockholders, the Commission approved the plan as amended. It stated that, in the event the common stockholders continued to litigate the fairness of the plan after approval by the district court, it would be appropriate "to achieve expeditious compliance with the Act and fairness to the persons affected . . . for Engineers to make prompt payment of $100 per share and accrued dividends in order to stop the accrual of further dividends, and set up an escrow arrangement." The escrow would secure the payment of the amount in issue and also "an additional amount to provide the preferred 'for the period of the escrow a return on the amount in escrow which is measured by the return which would have been received by it if the stock remained outstanding.' " Such an escrow could be established under court supervision without returning the plan to the Commission. Holding Company Act Release No. 7119, p. 6. By later order the Commission provided for the establishment of such an escrow at the option of Engineers if it appeared likely that common stockholders would litigate beyond the district court. Holding Company Act Release No. 7190.[13]

Proceedings in the District Court. The Commission applied to the District Court for the District of Delaware for approval of the plan as amended. § 11 (e). Cer-

[13] Counsel for the Commission has taken the position in these proceedings that this provision regarding an escrow did not constitute an "amendment" to the plan, stating that "The Commission expressly refused to amend the plan and said if an escrow turns out to be necessary it can be done under the aegis of the Court, and we have viewed the escrow device simply as a device in connection with the mechanics of consummation."

Commissioner Caffrey, while joining fully in the Commission's opinion, added that Engineers, as a holding company of a single

tain common stockholders, respondents in Nos. 226, 227, and 243, and petitioners in No. 266, filed objections to the plan, contending that the Commission had erred in awarding to the preferred stockholders the equivalent of the voluntary liquidation preferences of their shares. The Streeter group of preferred stockholders objected to the Commission's finding of the appropriateness of an escrow arrangement to stop the accrual of further dividends in the event of continued litigation.

The District Court considered the case on the record made before the Commission. It preferred not to determine whether the involuntary liquidation preferences controlled, but stated that "in each case the inquiry is one of relative rights based on colloquial equity." 71 F. Supp. 797, 802. That standard, thought the court, necessitated consideration of various factors to which it was thought the Commission had attached little or no importance. Thus it was important to consider not only the charter provisions but the issuing price in terms of what the company received for the securities, and the market history of the preferred. These factors might more than offset the factor of investment value, the testimony as to which the court accepted. In any event, thought the court, several other considerations have this effect. The Act, in addition to compelling the preferred stockholders to surrender "this present enhanced value,"

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utility company, would have been subject to proceedings under § 11 (b) (2) of the Act had it not come forward with a plan. Its dissolution, therefore, was a logical step following the required compliance with the Commission's orders under § 11 (b) (1), and was not voluntary. Commissioner Hanrahan concurred but thought the discussion of the investment values of the preferred wholly unnecessary, for in his view the liquidation was voluntary, and the preferred should therefore receive the voluntary liquidation preferences provided in Engineers' charter. Holding Company Act Release No. 7119.

worked hardships on the common. All classes of securities, the court said, suffered losses as a result of the divestment orders issued by the Commission under the Act. Earnings retained in the system at a sacrifice to the common contributed to the enhancement of the value of the preferred. These standards of "colloquial equity," which the District Court conceived to be controlling in our decision in *Otis & Co.* v. *Securities and Exchange Commission, supra,* compelled the conclusion that it would not be fair and equitable to give the preferred more than $100 per share. Arguments concerning the worth of the preferred in the absence of a Public Utility Holding Company Act were thought not profitable to consider *"for there is a Public Utility Holding Company Act."* In effect amending the plan to provide for payment of the preferred at $100 per share, the District Court approved the plan as thus amended. The escrow agreement prescribed by the Commission was approved, the court concluding that there was no merit in the preferred stockholders' objections to this feature. 71 F. Supp. 797.

Proceedings in the Court of Appeals. The Court of Appeals for the Third Circuit regarded as a central issue in the case the question whether the District Court had exceeded the scope of review properly exercised by a district court reviewing a plan under § 11 (e) of the Public Utility Holding Company Act. It concluded that the District Court was charged with the duty of exercising a full and independent judgment as to the fairness and equity of a plan, "to function as an equity reorganization tribunal within the limitations prescribed by the Act." 168 F. 2d 722, 736.

Turning to the various factors which should have been taken into consideration in arriving at the equitable equivalent to the rights surrendered by the preferred

shareholders, the Court of Appeals criticized the Commission for finding the investment value of the preferred as if there were no Holding Company Act while omitting to evaluate the common by the same standard, and for failing to consider factors other than the investment value. It was thought that the Commission should have estimated the future earning power of Engineers, absent a Holding Company Act, and apportioned that power between preferred and common stockholders in accordance with their respective claims. It was also thought that, in the process of valuing the preferred and the common by the same approach, the Commission should have considered "the substantial losses which occurred to Engineers by virtue of divestitures compelled by the Act." [14] Losses of this nature "should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping." *Id.* at 737–738.

But even an investment value figure properly arrived at is "only *one* of a series of factors to be used in arriving at equitable equivalents." The Commission was required to consider "All pertinent factors and all substantial equities," which presumably included the "colloquial equities" adverted to by the District Court. *Id.* at 738.

The District Court, however, was held to have erred in one particular: it had amended the plan by substituting its own valuation of $100 per share for the preferred stock for that of the Commission. The court had no power to do this. It could only reject the Commission's valuation, and return the case to the Commission for further action in the light of the court's views.

At the time the opinion of the Court of Appeals was rendered, the plan had been consummated, with the exception of the payment of the disputed amounts in

[14] Examples selected by the court were divestitures of interests in Puget Sound Power & Light Company and El Paso Natural Gas Company. See note 11 *supra* and note 38 *infra*.

excess of the involuntary liquidation preferences of the preferred. The escrow arrangement, which had been employed to preserve the issue of the amount to which the preferred was entitled after having been approved by the Commission and the District Court, was held to be proper.

We granted certiorari because of the importance of the questions presented in the administration of the Public Utility Holding Company Act. 335 U. S. 851.

I.

The Court of Appeals was of the view that the question of the extent of "the power conferred on the district courts . . . by the Act" was one which went "to the heart of the instant controversy." 168 F. 2d at 729. The Commission apparently took the position before that court that the District Court had erred in setting aside the agency's conclusions unless those conclusions lacked "any rational and statutory foundation." [15] This view was rejected by the Court of Appeals. Distinguishing judicial review under § 24 (a) as being limited to the inquiry whether the Commission "has plainly abused its discretion in these matters," *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 208,[16] the

[15] "The Commission takes the position before us that 'Unless the conclusions of the Commission lack "any rational and statutory foundation" they should not have been disturbed by the court below for the "fair and equitable" rule of Section 11 (e) . . . [was] inserted by the framers of the act in order to protect the various interests at stake. . . . The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters', citing, among other authorities, Securities Comm'n v. Chenery Corp. (the second Chenery case), 332 U. S. 194, 195, at pages 207, 208." 168 F. 2d at 729. See note 16, *infra*.

[16] The Court of Appeals held that the rule of review declared in the *Chenery* case was inapplicable in the present case because *Chenery* involved a proceeding for review under § 24 (a) of the Act, while this is a proceeding under § 11 (e). But see text *infra*.

Court of Appeals held that a § 11 (e) court was charged with the duty of exercising a full and independent judgment as to the fairness and equity of a plan, "to function as an equity reorganization tribunal within the limitations prescribed by the Act." 168 F. 2d at 736.

This position is maintained before this Court by the representatives of the common stockholders. The preferred stockholders' representatives urge that the Court of Appeals erred in this regard, and that the conclusion of the Commission should not have been disturbed by the District Court, because that conclusion was supported by substantial evidence and was within the agency's statutory authority. The District Court, in their view, exceeded the proper scope of review.

The Commission apparently no longer takes so restrictive a view of the District Court's function as it formerly held. It now concedes that that court had power to review "independently" the method of valuation employed. But it urges that in this case the question, whether a proper method of valuation was employed, is one of law, since Congress has itself prescribed the standard for compensating the various classes of security holders instead of delegating to the Commission the task of fixing that standard.

In the alternative the Commission argues that "If, as the court below seemed to assume, the question is not one of law, . . . the scope of review under Section 11 (e) is limited in the same manner as that applicable to determinations of the Interstate Commerce Commission under Section 77 of the Bankruptcy Act," which is said to embody a similar statutory scheme and under which administrative determinations of valuation are sustained if supported by substantial evidence and not contrary to law. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473; *R. F. C.* v. *Denver & Rio Grande W. R. Co.*, 328 U. S. 495, 505–509.

The problem of the scope of review which Congress intended the district court to exercise under § 11 (e) arises from and is complicated by the fact that Congress provided not one, but two procedures for reviewing Commission orders of the type now in question.

The first is afforded by § 11 (e) itself. It relates to orders approving voluntary plans submitted by any registered holding company or subsidiary for compliance with subsection (b). The Commission is authorized to approve such a plan if, after notice and opportunity for hearing, it "shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan." Then follows the provision that "the Commission, at the request of the company, may apply to a court . . . to enforce and carry out the terms and provisions of such plan. If . . . the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11," the court is authorized "as a court of equity" to take exclusive jurisdiction and possession of the company or companies and their assets, and to appoint a trustee, which may be the Commission, for purposes of carrying out the plan.[17]

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[17] The pertinent part of § 11 (e) is in terms as follows: "If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and

The alternative mode of review is provided by § 24 (a). It applies to all orders issued by the Commission under the Act and in abbreviated form is as follows:

> "Any person or party aggrieved by an order issued by the Commission . . . may obtain a review of such order in the circuit court of appeals . . . by filing in such court, within sixty days . . . a written petition . . . . [T]he Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. . . . [S]uch court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." [18]

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provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed." 49 Stat. 822, 15 U. S. C. § 79k (e).

[18] The full text of § 24 (a) is as follows:

"SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall

The District Court and the Court of Appeals, focusing their attention primarily on § 11 (e), emphasized the section's requirement of approval by the District Court, that court's declared status "as a court of equity," and the absence from § 11 (e) of such explicit provisions as those of § 24 (a) making the Commission's findings of fact conclusive, if supported by substantial evidence; limiting the court to consideration of objections urged before the Commission in the absence of reasonable grounds for failure to urge them; and restricting the court's consideration to the record made before the Commission in the absence of any showing requiring remand to the Commission for the taking of additional evidence.

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certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)." 49 Stat. 834, 15 U. S. C. § 79x.

Chiefly from these factors the two courts reached their respective conclusions that the District Court was required to exercise a full and independent judgment as to the fairness and equity of the plan, functioning as an equity reorganization tribunal within the limitations prescribed by the Act. However, they differed, as has been noted, concerning the scope of those limitations.

The District Court thought it was authorized to substitute its own judgment for that of the Commission as to whether the plan was "fair and equitable," after considering independently the various matters it denominated as "colloquial equities." Accordingly, after reaching numerous conclusions on those matters contrary to the Commission's or not given final effect in its determinations, the court arrived at an over-all judgment opposite to that of the Commission and held the plan not "fair and equitable" to the common stockholders in awarding the preferred more than $100 per share. Modifying the plan to allow the latter only that amount, the court ordered it enforced as modified.

The Court of Appeals was in general agreement with the District Court concerning its power to exercise a full and independent judgment in giving or withholding approval of the plan as "fair and equitable" and, on the whole, was in accord with the District Court's dispositions of the matters of "colloquial equity." Stressing statements appearing in the legislative history of § 11, the court thought they gave basis for a strong analogy between the functions of district courts under § 11 (e) and those of such courts "when called upon under the Sherman and Hepburn Acts to effect compulsory corporate readjustments required by the public policy expressed in those acts." [19] The court's opinion then added: "We think that it will not be contended that a district court . . . adjudging a controversy arising under the Sherman Act would function

[19] S. Rep. No. 621, 74th Cong., 1st Sess. 13; 168 F. 2d at 729.

other than as in an original equity proceeding, exercising all the powers and duties inherent in a court of equity under such circumstances." 168 F. 2d at 729. Accordingly, the court upheld the District Court's view that it had power, as a court of equity, to withhold approval and enforcement of the plan upon its own independent judgment of the "colloquial equities," notwithstanding the Commission's contrary judgment and, apparently, even though the Commission's judgment involved no clear error of law or abuse of discretion.

The Court of Appeals, however, viewed somewhat differently the limitations placed by the Act upon the power of review. "The proceedings before the equity reorganization court are not strictly *de novo* since the district court can only approve a plan when it has been approved by the Commission. See Application of Securities and Exchange Commission, D. C. Del., 50 F. Supp. 965, 966." 168 F. 2d at 732. The District Court, it was said, could receive evidence *aliunde* the Commission's record, could decide on that evidence and the Commission's record that the plan is unfair and inequitable, and remand the cause to the Commission for further consideration, or could remand without taking new evidence. The District Court therefore was wrong in ordering enforcement of the plan as modified by itself. It could only approve and enforce or refuse approval and remand. Only a plan approved by the Commission and by the court could be enforced.

These views were thought supported by the history of the law of reorganization, including equity receiverships, reorganization of insolvent companies under former § 77 B of the Bankruptcy Act, 11 U. S. C. § 207 *et seq.*, and Chapter X reorganizations (*id.* at § 501 *et seq.*), although the court did not "mean to imply that Congress intended to grant a Section 11 (e) court the same full and untrammeled scope that a court of bankruptcy would have in a Chapter X proceeding." 168 F. 2d at 735–736.

Nevertheless, "Any question which goes to the issue of what is fair and equitable may be raised and must be passed upon." *Id.* at 735. Moreover, since "the critical phrase employed alike by courts of equity and by Congress in framing the test under which a plan shall be approved or disapproved, has always embraced the phrase 'fair and equitable' or its substantial equivalent," the court thought that the power and functions of the district courts in review of plans submitted did not "vary much from statute to statute and from case to case," *id.* at 734, *i. e.*, whether the plan was to be consummated by way of equity receivership, by action under former § 77 B, by suit under Chapter X, by a proceeding under § 77, 11 U. S. C. § 205, or by petition to a district court under § 11 (e).

The variant views held respectively by the Commission, the District Court, the Court of Appeals, and the parties to the proceeding demonstrate the complexity of the problem. Each view has a rational basis of support, but none is without its difficulties, either in statutory terms, history and intent or in practical consequences.

The legislative history of § 11 (e) throws little light on the problem. There was, surprisingly, only casual, indeed tangental, discussion of it. The analogy to proceedings under § 77 of the Bankruptcy Act, drawn by the Commission and referred to by the Court of Appeals, rests chiefly upon the statement of Senator Wheeler, co-sponsor of the bill, made during a colloquy in debate on the Senate floor and set forth in the margin.[20] But that state-

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[20] 79 Cong. Rec. 8845:

"Mr. BORAH. Mr. President, I desire to ask the Senator from Montana a question.

"On page 50, beginning with line 2, the bill provides as follows:

" 'In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Com-

ment did not occur in any detailed consideration of the scope and incidence of judicial review. It arose only as it were incidentally in the course of extended discussion which centered about the receivership provisions of § 11 (e) as it stood at the time of the debate.

Moreover, the discussion did not and could not take account of the fact that, under our subsequent decisions in the *Western Pacific* and *Denver & Rio Grande* cases, *supra,* matters of valuation in § 77 reorganizations have been held to be exclusively for the Interstate Commerce Commission, not for the district courts, except as stated above. *Ecker* v. *Western Pacific R. Corp., supra; R. F. C.* v. *Denver & Rio Grande W. R. Co., supra.* Significantly, this fact seems not to have been taken into account when the Court of Appeals included the § 77 proceedings among its general grouping of reorganization procedures for analogical purposes. And in this respect the Commission makes clear its difference from the Court of

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mission after opportunity for hearing prior to its submission to the court.'

"I do not exactly understand that language. Does it mean that the court's jurisdiction with reference to the reorganization, or what shall be permitted by decree of the court, is limited; or is it simply recommendatory to the court?

"Mr. WHEELER. We do exactly the same thing at the present time, as I understand, with reference to the Interstate Commerce Commission. A plan for the reorganization of a railroad is supposed to be submitted to the Interstate Commerce Commission for its approval before it is approved by the court. We put this provision in here in practically the same manner, as I recall, as the existing provision with reference to the Interstate Commerce Commission in the case of railroad reorganizations.

. . . . .

"The Senator from Indiana [Mr. MINTON] has called my attention to the fact that the provision does not oust the jurisdiction of the court at all, because the court has to approve the plan even though the Commission approves it. In other words there is really a double check upon the plan, and final determination rests as in the past in the courts."

Appeals, pointing out that under the *Western Pacific* and *Rio Grande* decisions the Commission decides questions of valuation, subject only to the narrow scope of review there allowed.

But, as if to complicate the matter further, the Commission's analogy is somewhat weakened by the fact that the *Western Pacific* and *Rio Grande* rulings concerning review of valuation matters rested upon language in § 77 not repeated in § 11 (e) of the Act presently in question. That language, appearing in subsection (e) of § 77, provided: "If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan." This, the Court held, left to the Interstate Commerce Commission the determination of value "without the necessity of a reëxamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards." 318 U. S. at 472–473.

On the other hand, the opposing analogy drawn by the Court of Appeals from the history of the law of reorganization in general is highly indiscriminate. Insofar as it includes equity receiverships, *e. g.*, pursuant to Sherman and Hepburn Act readjustments, it ignores the important fact that in such proceedings there is no effort to brigade the administrative and judicial processes. Nor does it take account of the substantial differences "from statute to statute," *e. g.*, between proceedings under § 77 of the Bankruptcy Act as construed in the *Western Pacific* and *Rio Grande* cases, on the one hand, and Chapter X reorganizations, on the other. Moreover, and perhaps most important, it substitutes analogy drawn from other statutes and judicial proceedings, together with a reading of § 11 (e) in comparative isolation from the other provisions of the Act, for a consideration of that section in the context of the Act, as a whole and particularly with

reference to any effort toward harmonizing the section with § 24 (a) and bringing the two as close together as possible in practical operation.

Of course Congress could provide two entirely dissimilar procedures for review, depending on whether appeal were taken by an aggrieved person to a Court of Appeals or the plan were submitted by the Commission at the Company's request to a district court. But it is hard to imagine any good reason that would move Congress to do this deliberately. The practical effect of assuming that Congress intended the review under § 11 (e) to be conducted wholly without reference to or consideration of the limitations expressly provided for the review under § 24 (a) certainly would produce incongruous results which would be very difficult to impute to Congress in the absence of unmistakably explicit command.

For one thing the consequence would be, in effect, to create to a very large possible extent differing standards for administration and application of the act, depending upon which mode of review were invoked. In the one instance, apart from reviewable legal questions, the Commission's expert judgment on the very technical and complicated matters to deal with which the Commission was established, would be controlling. In the other instance, it would have to give way to the contrary view of whatever district court the plan might be submitted to.

Conceivably the same plan might be brought under review by both routes. Indeed, in one instance the District Court for Delaware, to which the plan here was submitted, held that its determination of the issues in a § 11 (e) proceeding was precluded by a prior affirmation of the same order by a Court of Appeals in a § 24 (a) review proceeding. See *L. J. Marquis & Co.* v. *Securities & Exchange Commission,* 134 F. 2d 822, and *Application of Securities and Exchange Commission,* 50 F. Supp. 965. Presumably, under the views now taken by the District Court and the Court of Appeals, if district court review

under § 11 (e) could be had first, that determination likewise would be conclusive as against contrary views held by the Commission and a Court of Appeals in a later § 24 (a) proceeding.

Moreover, apart from legal questions, the controlling standard would be fixed by the discretion of the district court to which the plan might be submitted. And since such a court might be any of the many district courts available for that purpose, there hardly could be the uniform application of the "fair and equitable" standard which Congress undoubtedly had in mind when it entrusted its primary administration to the Commission's expert judgment and experience, and when it drafted the detailed provisions of § 24 (a) for review. To the extent at least that the standard contemplated an area of expert discretion, its content under the view taken by the District Court and the Court of Appeals could not be uniform, but would vary from court to court as the judicial discretion might differ from that of the Commission or other courts.

In contrast with the specific limitations of § 24 (a), the very brevity and lack of specificity of § 11 (e), together with the paucity and tentative character of the legislative history, concerning the scope of review under the latter section, give caution against reading its terms as importing a breadth of review highly inconsistent with the limitations expressly provided by § 24 (a). Both sections are parts of the same statute, designed to give effect to the same legislative policies and to secure uniform application of the statutory standards. That statutory context and those objects should outweigh any general considerations or analogies drawn indiscriminately from differing statutes or from the history of reorganizations in general, leading as these do to incongruities and diversities in practical application of the Act's terms and policies.

Indeed we think it is fair to conclude that the primary object of § 11 (e) was not to provide a highly different scope of judicial review from that afforded by § 24 (a), but was to enable the Commission, by giving it the authority to invoke the court's power, to mobilize the judicial authority in carrying out the policies of the Act. To do this the court "as a court of equity" was authorized to "take exclusive jurisdiction and possession of" the company or companies and their assets and to appoint a trustee to hold and administer the assets under the court's direction.

True, the court was to approve the plan as fair and equitable; but nothing was said expressly as to the scope of review or the resolution of differences in discretionary matters between the Commission and the court. The court's characterization as "a court of equity" was appropriate in relation to the powers of enforcement conferred. We do not think it was intended to define with accuracy the scope of review to be exercised over matters committed to the Commission's discretion and expert judgment, not involving questions of law, or to set up a different and conflicting standard in those matters from the one to be applied in proceedings under § 24 (a). This view is not inconsistent with Senator Wheeler's comparison with § 77 proceedings under the Bankruptcy Act, which perhaps, despite its rather casual interjection, most nearly approaches disclosure of the legislative intent as to the present problem.

It may be added that, in general, the courts which have dealt with the problem appear to have taken the view we take,[21] as against the one prevailing in the District

[21] *Lahti* v. *New England Power Assn.*, 160 F. 2d 845 (C. A. 1st Cir., 1947), aff'g *In re New England Power Assn.*, 66 F. Supp. 378 (D. Mass. 1946); *Massachusetts Life Ins. Co.* v. *S. E. C.*, 151 F. 2d 424 (C. A. 8th Cir., 1945), aff'g *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo. 1944); *In re Electric Bond & Share Co.*,

Court and the Court of Appeals which reviewed this case,[22] although in no case has the question been so sharply focused as here. While § 11 (e), as we have noted, does not contain language the equivalent of subsection (e) of § 77 of the Bankruptcy Act upon which this Court rested its ruling concerning review of valuations in the *Western Pacific* case, that lack may be supplied in this case by the correlation we think is required between the terms of § 11 (e) and those of § 24 (a). Accordingly we are unable to accept the conclusion of the Court of Appeals and the District Court that the latter was free, in passing upon the Commission's valuations, to disregard its judgment in the large areas of discretion committed by the Act to that judgment.

Administrative finality is not, of course, applicable only to agency findings of "fact" in the narrow, literal sense. The Commission's findings as to valuation, which are based upon judgment and prediction, as well as upon "facts," like the valuation findings of the Interstate Commerce Commission in reorganizations under § 77 of the Bankruptcy Act, *Ecker* v. *Western Pacific R. Corp.*, *supra*, are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at "in accordance with legal standards."

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73 F. Supp. 426 (S. D. N. Y. 1946); *In re Eastern Minnesota Power Corp.*, 74 F. Supp. 528 (D. Minn. 1947); *In re Kings County Lighting Co.*, 72 F. Supp. 767 (E. D. N. Y. 1947), aff'd *sub nom.*, *Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. 2d 784 (C. A. 2d Cir., 1948); *In re New England Public Service Co.*, 73 F. Supp. 452 (D. Me. 1947).

[22] *In re Community Gas & Power Co.*, 168 F. 2d 740 (C. A. 3d Cir., 1948), aff'g 71 F. Supp. 171 (D. Del. 1947); *In re North West Utilities Co.*, 76 F. Supp. 63 (D. Del. 1948); *In re Interstate Power Co.*, 71 F. Supp. 164 (D. Del. 1947); accord, *Illinois Iowa Power Co.* v. *North American Light & Power Co.*, 49 F. Supp. 277 (D. Del. 1943); but see *In re Standard Gas & Electric Co.*, 151 F. 2d 326 (C. A. 3d Cir., 1945), reversing 59 F. Supp. 274 (D. Del. 1945).

Administrative determinations of policy, often based upon undisputed basic facts, in an area in which Congress has given the agency authority to develop rules based upon its expert knowledge and experience, are exemplified by *Securities and Exchange Commission* v. *Chenery Corp., supra,* in which the Commission determined that preferred stock purchased by management in the over-the-counter market during the formulation of a holding company reorganization plan could not be exchanged for common stock participation in the reorganized company, as could other preferred stock; instead management was to be paid cost plus interest for the preferred stock so purchased.

The Commission's determination was made in the exercise of its duty to determine that a plan is "fair and equitable" within the meaning of § 11 (e) and that it is not "detrimental to the public interest or the interest of investors or consumers" within the meaning of § 7 (d) (6) and § 7 (e). On certiorari to the Court of Appeals which had reviewed the Commission's order under § 24 (a) of the Act, we held that the Commission's action was "an allowable judgment which we cannot disturb." 332 U. S. 194, at 209. This holding was not based upon the fact that the Commission's order was reviewed under § 24 (a) of the Act rather than under § 11 (e), but upon the ground that the Commission's determination was made in an area in which Congress had delegated policy decisions of this sort to the Commission, and therefore that the agency determination was "consistent with the authority granted by Congress." *Id.* at 207. We think this view is applicable when review is had under § 11 (e) as much as when it arises under § 24 (a).

Even with the latitude allowed by our present ruling for play of the Commission's judgment, it remains to consider whether in this case the Commission has com-

plied with the statutory standards in its determination that the plan as amended by it is fair and equitable. The common shareholders deny this. And, contrary to the preferred shareholders' position, the Commission has argued, alternatively to its contentions concerning the scope of review, that application of the "fair and equitable" standard of § 11 (e) in this case presents questions of law which have been decided erroneously by the District Court and the Court of Appeals.

Taken most broadly, this argument of the Commission seems to be that the entire matter of applying the "fair and equitable" standard involves only legal issues, with the result that each subsidiary question raised and determined in that process becomes independently reviewable and judicially determinable. If so, of course, the question of the proper scope of review would become irrelevant, at any rate for the purposes of this case, since it was determined solely on the record made before the Commission.

But the Commission does not stop with this broad argument. It goes on to consider particular questions which arose in the valuation process and to urge that they presented questions of law which the reviewing courts erroneously determined. Among these are whether the court's dispositions violated the "absolute priority" standard attributed to the *Otis* case; whether their requirement that the Commission value the common stock in the same manner as it did the preferred, rather than simply awarding to the common shareholders all of Engineers' assets remaining after giving the preferred the equitable equivalent of their shares as determined, violated the statutory standard; whether the courts rightly required the Commission to take into account alleged losses incurred by Engineers in earlier dispositions of company properties made to comply with the Act; and whether the Commission improperly failed to take into

account other matters of "colloquial equity" the courts considered not only proper but essential to a fair and equitable determination.

We think at least some of these matters do raise legal issues, particularly in the light of the *Otis* decision, which should now be considered and resolved. Accordingly we turn to them for that purpose.

II.

Challenges to the Investment Value Theory of Valuation. The principal effect of the *Otis* decision was to rule that in simplification proceedings pursuant to §§ 11 (b) (2) and (e) of the Act the involuntary charter liquidation preference does not of itself determine the amounts shareholders are to receive, but instead the amounts allocated should be the equitable equivalent of the securities' investment value on a going-concern basis.

The common shareholders seek to avoid the effect of this ruling by various arguments presently to be stated, which should be considered and determined in the light of the *Otis* decision and the Commission's practice consistent with that decision, a summary of which practice is set forth in the Appendix to this opinion.

In the *Otis* case the plan called for the dissolution of the United Light and Power Company, the top holding company in the system, in obedience to a Commission order requiring the elimination of that company, whose existence violated the "great-grandfather clause" of § 11 (b) (2). Since both common and preferred stockholders were to receive, in exchange for their stock in United Power, stock in its subsidiary, the United Light and Railways Company, which was itself a holding company, the effect of the dissolution was to eliminate the top holding company in a multi-tiered holding company system, leaving both classes of security holders with an investment in a continuing holding company enterprise.

The assets of United Power were insufficient to satisfy the claims of the company's preferred stockholders, if the charter liquidation preference of the preferred was applicable. The Commission found however that "if all the assumed earnings materialized and were applied to liquidating the preferred current and deferred dividends, in approximately fifteen years the arrearages would be paid and the common would be in a position to receive dividends," 323 U. S. at 632, and that only by forced liquidation could the common be deprived of all right to future earnings and the preferred be given the right to prospective earnings in excess of the dividends guaranteed by charter. The Commission concluded that "in its 'over-all judgment' Power's common had a legitimate investment value of a proportion of 5.48 per cent of Power's assets to the preferred's value of 94.52 per cent." *Ibid.* Relying on the legislative history of the Act, 323 U. S. at 636–637, and upon the fact that the charter provision was not drafted in contemplation of the legislative policy embodied in the Act, *id.* at 637–638, we held that the Commission had not erred in its method of valuation. By this ruling we rejected the easier solution of permitting liquidations or reorganizations compelled by the Act to mature charter rights and thus to shift investment values from one class of security holders to another.

In so ruling, this Court did not abandon the "absolute priority" standard insofar as embodied in the requirement that the plan be "fair and equitable." [23] That standard requires that each security holder be given the equitable equivalent of the rights surrendered, but the equitable equivalent is not invariably the charter liquida-

[23] *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 565; *Northern Pacific R. Co.* v. *Boyd*, 228 U. S. 482; *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510; *Marine Properties* v. *Manufacturers Trust Co.*, 317 U. S. 78; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448; *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 634.

tion preference, as it is in the case of liquidations or reorganizations brought about through the action of creditors or stockholders. The principle of the *Otis* case is that the measure of equitable equivalence for purposes of simplification proceedings compelled by the Holding Company Act is the value of the securities "on the basis of a going business and not as though a liquidation were taking place." 323 U. S. at 633.

The decisions of the Commission, from the commencement of its enforcement of the Public Utility Holding Company Act to the present time, show a consistent and developing application of the investment value rule approved in the *Otis* case.[24] At least since its decision in that case charter provisions have been held invariably not to be determinative. Federal courts which have had occasion to speak in this connection have recognized that charter liquidation provisions are not the measures of stockholders' rights in liquidations and reorganizations compelled by the Act.[25]

Seeking to distinguish the *Otis* case, the representatives of the common stockholders contend that here the charter liquidation provisions are applicable, from which of course it would follow that those provisions are the measure of equitable equivalence.

It is urged first that Engineers' charter liquidation provision is phrased in more comprehensive terms than was the one in *Otis*, and that the framers of Engineers' charter

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[24] See the Appendix to this opinion, *post*, p. 155.

[25] *Massachusetts Mutual Life Insurance Co.* v. *Securities and Exchange Commission*, 151 F. 2d 424, 430. The Court of Appeals in this case agreed that charter provisions were not determinative, 168 F. 2d at 736. While the district judge declined to decide whether the involuntary liquidation preference applied in this case, he has elsewhere indicated his awareness that charter provisions do not control in liquidations compelled by the Act. *In re Consolidated Electric & Gas Co.*, 55 F. Supp. 211, 216; *In re North Continent Utilities Corp.*, 54 F. Supp. 527, 530–531.

contemplated the possibility of governmental action of the kind required by the Holding Company Act. A comparison of the two charter provisions reveals no significant difference between them.[26] Engineers' charter was drafted some four years earlier than the *Otis* charter. Each contract was made at a time when the legislative policy embodied in the Holding Company Act "was not foreseeable." 323 U. S. at 638.[27]

A further asserted distinction is that there is here a "genuine liquidation," *i. e.*, a termination of the holding company enterprise by the liquidation of the last holding company in the system; while in the *Otis* case "the holding company enterprise continued essentially unchanged, even though the particular corporation there involved was being dissolved pursuant to the mandate of the Act, as an incident to the simplification of the continuing system."

It would probably suffice to observe that the word "liquidation," as used in Engineers' charter liquidation provision, quite obviously means liquidation of Engineers, not liquidation of other corporations or of the holding company enterprise of which Engineers is a part. But there are more fundamental reasons which require the rejection of this argument. The legislative history relied

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[26] Engineers' charter provides that preferred shareholders shall receive $100 per share, plus accrued dividends, "In the event of any liquidation, dissolution or winding up of this Corporation." In *Otis* the liquidation preference was payable "Upon the dissolution or liquidation of the corporation, whether voluntary or involuntary." 323 U. S. at 630, n. 6.

[27] The conclusion that liquidation compelled by governmental edict was not foreseen at the time Engineers' charter was drafted is reenforced by a statement appearing in the record, made by counsel for Engineers, one of the draftsmen of the charter, apparently in connection with another case, that a § 11 liquidation "is an arbitrarily and forced statutory termination of the enterprise, and it has no relation whatsoever to any factors which the parties could have had in mind when they entered the enterprise."

upon in the *Otis* case, 323 U. S. at 636–637, contains no hint that Congress intended to preserve investment values only when the policy of the Act required a reduction in the number of holding companies in a system rather than the elimination of the system's last holding company.[28] And the *Otis* opinion rejected the Commission's argument in that case that the result there was justified by the fact that the holding company enterprise was to continue. We said that the reason for the inapplicability of charter provisions

> "does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors." 323 U. S. at 638.

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[28] The common stockholders contend that the repeated references in the legislative history of the Holding Company Act to *Continental Insurance Company* v. *United States*, 259 U. S. 156 (S. Rep. No. 621, 74th Cong., 1st Sess. 33; H. R. Rep. No. 1318, 74th Cong., 1st Sess. 49–50; 79 Cong. Rec. 4607, 8432) "leave no doubt that at least when a genuine liquidation is compelled by the Act," charter provisions were intended to control. But these congressional references to the *Continental* case were in support of propositions other than that charter liquidation provisions are applicable to liquidations compelled by the Act. The *Otis* opinion pointed out that the *Continental* case "turned . . . on the charter rights of the preferred to share equally with the common in earnings which had become assets, . . . not on whether a right to share was matured or varied by governmental action." 323 U. S. at 639. The opinion proceeds to refute expressly the contentions made by the common stockholders here: "We do not feel constrained by [the *Continental* case's] dealing with charter rights as in a normal liquidation to hold that where liquidation is adopted as a matter of administrative routine, the preferences are thereby matured." *Ibid.*

Far from aiding the distinction urged by the common stockholders, *Schwabacher* v. *United States*, 334 U. S. 182, supports the conclusion that investment values rather than charter provisions provide the measure of the preferred stockholders' rights. In that case the Court held that the charter liquidation provision of a railroad corporation merging with another railroad under § 5 of the Interstate Commerce Act was not determinative of the amount to which holders of cumulative preferred stock were entitled, and that "In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good." 334 U. S. at 199.

Again this result depended, not upon the fact that the merger left a continuing enterprise, but upon the fact that Congress, in its efforts to achieve a particular economic goal, wished to avoid shifting investment values from one class of securities to another by maturing contract rights which would not otherwise have matured. As did the *Otis* opinion, which was said to construe "a federal statute of very similar purposes," [29] the *Schwabacher* opinion

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[29] The *Otis* case was described as follows: "In construing the words 'fair and equitable' in a federal statute of very similar purposes, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is satisfied by giving each class the full economic equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued 'on the basis of a going business and not as though a liquidation were taking place.' Consequently the liquidation preferences were only one factor in valuation rather than determinative of amounts payable." 334 U. S. at 199.

assumed "that Congress intended to exercise its power with the least possible harm to citizens." *Otis & Co.* v. *Securities and Exchange Commission, supra* at 638.

The final reason for rejecting the asserted distinction between liquidation of the particular corporation and liquidation of the holding company enterprise serves also to answer a further, related argument made by the representatives of the common stockholders. It is said that payment of the preferred stockholders in cash rather than in securities of a new corporation and the consequent termination of these stockholders' investment "matures" the preferred claims and makes this a "genuine liquidation." These arguments, which necessarily imply that the Commission may not choose the elimination of one company in a system rather than another or payment in cash rather than securities as means of conforming the enterprise to the requirements of the Act, without varying the standard by which stockholders are to be compensated, are answered in the *Otis* opinion. We held there that security values should not

> "be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question. The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken." 323 U. S. at 637–638.

The common stockholders argue also that, even if the charter liquidation provision be deemed inapplicable, the "fair and equitable" standard requires the application of the "doctrine of frustration." It is said that frustration of a contract by governmental edict or any other supervening event not contemplated by the parties requires that "the loss . . . lie where it falls. Neither party can be compelled to pay for the other's disappointed expectations." [30] In such a case, it is said, "the face amount of the security—which theoretically mirrors the senior security holder's contribution to the enterprise—is all that he is entitled to recover." Again the *Otis* case is said to be distinguishable in that there the preferred stockholders were to receive a participation in the continuing enterprise, while here their investment is terminated by payment in cash. But, as we observed above, the Commission is not to be hampered in its enforcement of the policies of the Act "by considerations of avoidance of harsh effects on various stock interests."

The authorities relied upon in support of the frustration argument would not compel the result for which the common stockholders contend, even in the absence of the *Otis* decision. Considerable reliance is placed upon *The United Light & Power Co.,* 10 S. E. C. 1215, and the affirmance of that decision by the Court of Appeals for the Second Circuit in *New York Trust Co.* v. *Securities and Exchange Commission,* 131 F. 2d 274. In that case the plan, a different feature of which was reviewed in the *Otis* case, provided for payment to the company's debenture holders in cash. The Commission, after deciding that voluntary liquidation preferences were not payable, and that the bondholders had no right to receive the premium "by virtue of any other recognized legal or

[30] American Law Institute, Restatement, Contracts § 468, comment on subsection (3).

equitable principle," held that there was no right to compensation for the termination of the investment, which, like the termination of the stockholders' investments, had been "brought about by the act of a sovereign power—in this case a congressional mandate." 10 S. E. C. at 1223, 1228. In affirming the Commission's determination, the Court of Appeals held that "the contract is no longer binding and further performance is excused. . . . where, as here, the essential existence of one of the parties to a contract has become illegal and impossible because contrary to a new concept of public policy which was unforeseeable when the contract was made." 131 F. 2d at 276. Since the corporation was under no obligation to call the bonds, "it might well let the rights of those in interest be determined as though there had been no call option. The order under review was, accordingly, fair and reasonable to all parties in interest since it provided for the payment of the bonds in a way which discharged in full the contract obligations of the dissolved corporation." *Ibid.*

Even if it is assumed that no distinction is to be made between bonds and preferred stock,[31] neither the decision of the Court of Appeals nor that of the Commission in the *New York Trust* case is inconsistent with the later *Otis* decision or with the position of the Commission in

[31] The analogy between bonds and preferred stock, cf. 2 Dewing, The Financial Policy of Corporations 1247, n. r. (4th ed., 1941), is subject to obvious limitations. For example, if the claims of bondholders rather than preferred stockholders had been in issue in the *Otis* case, United Power would have been an insolvent rather than a solvent corporation and so subject to bankruptcy. At least with reference to the issue of whether amounts in excess of the face value of a security are payable, we need not distinguish between treatment to be accorded bonds and preferred stock. The Commission's tendency has been to treat both the same. See, e. g., *The United Light & Power Co.*, 10 S. E. C. 1215, 1226–1227; *Cities Service Co.*, Holding Company Act Release No. 4944.

this case, insofar as each holds that performance of the charter contract is excused.[32] Engineers is no longer required by its contract either to continue the payment of preferred dividends beyond the dissolution date provided in the plan or to redeem the preferred at either voluntary or involuntary charter liquidation prices.

Moreover the *New York Trust* case need not be construed to fix the measure of the senior security holder's claim at the face amount of his security. In *Massachusetts Mutual Life Insurance Co.* v. *Securities and Exchange Commission,* 151 F. 2d 424,[33] the Court of Appeals for the Eighth Circuit recognized that the doctrine of impossibility or frustration applied in the *New York Trust* case excused the corporation from its contractual obligations and agreed with the Commission that it would not be fair and equitable to pay redemption premiums in the circumstances of that case. But the Court observed that "whether, upon retirement of outstanding bonds . . . payment of principal, accrued interest, *and* redemption premiums is the equitable equivalent of the bondholders' rights depends upon the facts of each particular case." 151 F. 2d at 430.[34]

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[32] The citation by the *Otis* majority, "Compare *New York Trust Co.* v. *Securities & Exchange Commission,* 131 F. 2d 274; *In re Laclede Gas Light Co.,* 57 F. Supp. 997," is of no assistance to the common stockholders here, for it is in support of and directly following the sentence: "Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate." 323 U. S. at 638.

[33] Affirming *In re Laclede Gas Light Co.,* 57 F. Supp. 997.

[34] Two other decisions in the courts of appeals, which cite and purport to follow the *New York Trust* case, reason that the premium is payable only in the event of voluntary redemption of the bond, that the redemption is not voluntary, and therefore that the premium is not payable. Since this syllogism disposes of each case without reference to the doctrine of frustration, the frustration rationale of

The doctrine of impossibility or frustration explains the conclusion that the corporation is excused from performing its contract, but it does not provide a measure of the security holders' claims. For that measure, we must look to the intention of Congress, as we did in the *Otis* case.

III.

Application of the Investment Value Theory: The Commission's Alleged Failure to Take Account of Prior Divestment Losses Sustained by Engineers; Its Alleged Failure to Value the Common Stock by the Same Method as Was Used in Valuing the Preferred; "Colloquial Equities." It was the Commission's duty in passing upon the fairness and equity of the plan to accord each security holder, in the order of his priority, the investment or going-concern value of his security. Here, as in the *Otis* case, the manifest solvency of Engineers "simplifies the problem of stockholders' rights . . . . The creditors are satisfied." 323 U. S. at 633–634. Valuation on the basis of a going concern necessarily has primary relationship to value as of the time the shareholders' surrender becomes effective, not as of some earlier, remote period or one long afterward. Moreover,

> "Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be 'fair and equitable,' incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions

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the *New York Trust* case is an alternative ground in both cases. *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. 2d 65; *In re Standard Gas & Electric Co.*, 151 F. 2d 326.

> one class of stockholders is superior to another in its claim against earnings or assets, that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion." [35]

These are the governing principles to be applied in consideration of the differences between the Commission and the reviewing courts concerning the matters listed in the heading of this paragraph. It is important to note that the doctrine of allowing equitable equivalents of present going-concern value to replace stated charter liquidation value as the measure of security satisfaction did not and was not intended to destroy charter or contract right to priority of satisfaction.

A. The investment value or going-concern value theory rests upon the premise that Congress intended to exercise its power to simplify holding company systems and to remove uneconomic companies without destroying legitimate investment value. It is consistent with this premise that the investment value determined by the Commission be the investment value the securities would have if it were not for the liquidation required by the Act. This does not mean, however, that the agency must value the stock as if the Act had never affected the holding company system of which the particular company dealt with in the plan is a part.[36] When the Commission values a security interest by determining the value that interest would have if it were not for the present liquidation or reorganization required by the Act, it substantially complies with the statutory mandate.

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[35] 323 U. S. at 634. See also the quoted statement of the Commission's views, as opposed to those of Commissioner Healy, set forth *id.* at 635, n. 17; Holding Company Act Release No. 4215, p. 12.

[36] The Court of Appeals took the Commission's method to be valuation "as if the Act had never been passed." It criticized the Commission for valuing the preferreds on this basis but not valuing the common in the same manner. 168 F. 2d at 737–738.

There are at least two sufficient reasons, both of which are illustrated by the present case. It would be administratively impossible, in determining the investment value of securities in a corporation being liquidated, to reevaluate every transaction in the gradual simplification of the system of which the company is a part, as if the Act had never been passed.[37] If the Commission were required to reconstitute Engineers' balance sheet as if the Act had never been passed, it would be necessary, for example, retroactively to evaluate the economic consequences of the compelled divestment of Engineers' interest in Puget Sound Power and Light Corporation in 1943 and to determine whether and to what extent Engineers would have gained or lost by retaining its interest in Puget Sound to the present time.[38] The difficulties of

[37] The Court of Appeals thought that, if the Commission wished to value the securities "*ex* the Act, losses of the sort referred to in this paragraph must be weighed into the calculation, i. e., such losses should be returned to the credit side of the enterprise's balance sheet as a matter of bookkeeping." 168 F. 2d at 738.

[38] In the Puget Sound reorganization Engineers received as of 1943 approximately a 3% interest in the new common stock in return for its old 99.3% common stock interest. The old common was estimated to be 18 to 34 years away from dividends in the absence of a reorganization. 13 S. E. C. 226. As in the *Otis* case, the controversy was over the question of whether Engineers was entitled to any participation in the new company, in view of the remote and contingent character of its earnings expectations. Engineers subsequently sold the interest it received in the reorganization for $764,765.

The Court of Appeals' conclusion that Engineers lost through the Puget Sound divestment is based upon the premise that actual earnings of the new company were considerably higher during 1946 and the first half of 1947 than the estimated earnings upon which the Commission based its reorganization allowance to Engineers. 168 F. 2d at 737, citing Moody's Public Utility Manual (1947) 53, and Supp. Vol. 19, at 1914.

The Commission correctly observes that this is an oversimplification of the complex problems involved in the valuation of Engineers' interest in Puget Sound and of the relationship between

going through such a procedure, multiplied by the number of divestments compelled by the Act over many years,[39] would be insuperable.

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that interest in 1943 and its hypothetical value today if no recapitalization and divestment had occurred. It notes that the earnings figures taken from Moody's fail to reflect the use of a much lower depreciation allowance that the Commission thought appropriate in making its earnings estimate, capital expenditures since 1943, and divestment of certain properties after Puget Sound had ceased to be subject to the Act. The period taken by the Court of Appeals can hardly be assumed to provide a reliable average earnings figure. Absent the impact of the Act, recapitalization of Puget Sound would probably have been necessary in the exercise of sound business judgment, a consideration which imports numerous additional uncertainties. Further, the evaluation of the Puget Sound divestiture required by the Court of Appeals would compel the Commission to estimate the effects of Engineers' hypothetical lack of the $764,765 received from the sale of the securities received in the Puget recapitalization, funds which were actually used to purchase additional interests in other companies and to make payments to Engineers' preferred stocks. Certain tax advantages derived from the sale of Puget would have to be taken into account.

The Court of Appeals also cited the El Paso Natural Gas Company divestiture as an example of a loss to Engineers caused by the Act, saying, "Under this divestiture Engineers lost a profit of at least $4,000,000." 168 F. 2d at 737. In 1931 Engineers loaned El Paso $3,500,000 and received in return $3,500,000 in bonds and an option to purchase 192,119 shares of El Paso's common stock. As a result of the exercise or assignment of some of these options and the resale in 1936, 1937 and 1944 of stock acquired by their exercise, Engineers realized a profit, in addition to the repayment of the loan, of $2,700,000 on its El Paso investment. The statement that these transactions involved a loss of $4,000,000 to Engineers is based upon the assumptions that the timing of the sales was compelled by § 11 and not by managerial judgment, that in the absence of § 11 management would have sold the stock at the very peak of the market, and upon other equally dubious premises.

[39] Engineers' system consisted of 17 companies before the Commission began its integration proceedings. See note 2 and text, *supra*.

The second reason lies in the basis for the *Otis* rule itself. Since Congress intended that investment values should be preserved in each liquidation or divestiture required by the Act, we may assume that it intended the Commission to value securities in a particular liquidation as if that liquidation were not taking place, but not as if the Act had never been passed; for, if investment values have been preserved in the early divestitures, it is useless to reconstitute the balance sheet as if the divestitures had not taken place. The Commission's determinations upon which the various divestiture orders were based may not be collaterally attacked.

B. We have observed that the standard of compensation to be accorded security holders does not depend upon whether their security interests are to be retired by exchanging them for new securities in a continuing enterprise or by payment in cash. However, these different methods of compensating the security holder determine which of varying methods of arriving at investment value will be employed by the Commission. Where the security holder is to receive new securities, the Commission is faced with a dual valuation problem. It must evaluate the security to be surrendered and the securities to be received in exchange. Recognizing the inherent complexity of this problem, this Court has held that a security holder may be accorded the equitable equivalent of the rights surrendered without placing a dollar valuation upon either the rights surrendered or the securities given in compensation therefor.[40] In the *Otis* case, in which the plan contemplated compensating both preferred and common stockholders of United Power in common stock of Power's sole subsidiary, the Commission

[40] *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482–483; *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 565–566; *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 639–640.

was required to apportion the Power common between the two classes by evaluating the expectation of income from the new stock and the risk factor of that stock in relation to the rights being surrendered. In effect the Commission's task was to apportion to the new stock earning power substantially equivalent to that surrendered.

But when the claims of the senior security holders are to be satisfied by payment in cash, the Commission appropriately varies its approach. In such a case it holds that "the most workable hypothesis for finding a fair equivalent between cash received and the security surrendered under the compulsion of the plan, is that of reinvestment in a security of comparable risk." The question to which the Commission seeks the answer is, "How much money would it cost the preferred stockholders to replace their securities with comparable ones?"

Badger sought to provide an answer to this question by deriving from his analysis and comparison a proper yield basis for Engineers' preferred,[41] which, taking into account the effect of the risk factor, he found to be 4.6%. Capitalization of this rate gave the preferreds values ranging from $108.70 per share to $130.33 per share, amounts well in excess of the call prices. The testimony of Engineers' president, Barnes, as to "what a willing buyer would pay and what a willing seller would take in today's market for such securities," absent a Public Utility Holding Company Act, coincided with that of Badger, as to the estimated going-concern value in cash of the preferred.[42]

The Commission did not rely exclusively on this expert testimony but made its own study of the market and

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[41] Badger's analysis, as summarized by the Commission, is stated in note 8, *supra*.

[42] See text *supra*, paragraph following note 8.

dividend history and the earnings coverage and assets coverage of the preferred. This served not only as a check upon the accuracy of Badger's premises but as a basis for the Commission's exercise of its independent judgment. The Commission found it unnecessary to make its own independent estimate of the dollar value of the preferred stock, absent a Holding Company Act.[43] When it became apparent that the going-concern value would exceed the call prices of the stocks by a considerable amount, the exact going-concern value became immaterial, because the call price, at which the corporation could always retire the preferred without reference to the Act, marked the limits of the preferreds' claims.

The common stockholders contend that this method of valuation, as employed in this case, produced only "a hypothetical market value of the preferreds based on market prices as of the time when the testimony of Badger and Barnes was given (the first few months of 1946)." They criticize Badger, whose evidence was undisputed and was accepted by the Commission, for failing to employ, as a basis for comparison, median prices and

[43] The Court of Appeals stated that the Commission erred in failing to "give any substantial consideration to the future earning power of Engineers and its subsidiaries which the Supreme Court has held is one of the fundamental tests for reorganization valuation." 168 F. 2d at 736–737. A precise finding as to prospective earnings of a continuing Engineers would be the controlling subsidiary finding upon which a precise finding as to going-concern value "*ex* the Act" would be based. See *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 540; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 525; 6 Collier, Bankruptcy 3849–3855 (14th ed., 1947). But where it is clear that the prospective earnings of the corporation would be more than enough to continue payment of preferred dividends and to carry the going-concern value, absent call provisions, well above the call price, there is no necessity for making a precise forecast of future earnings, for the call price marks the ceiling. Cf. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 479–483.

yields of the securities chosen for comparison, computed on the basis of prices covering a representative period of time; they complain that the low yield rates and high market levels of January, 1946, were abnormal. And it is said that the Commission and Badger failed properly to evaluate Engineers' economic future, absent a Holding Company Act, *i. e.*, failed to make "a prediction as to what will occur in the future, an estimate . . . based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance." *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, 526.

We may concede that, even though the preferred is to be paid in cash and thus should receive cash sufficient to purchase a comparable investment with a comparable yield, the Commission would be wrong in selecting, as a basis for valuation, abnormal or highly speculative market values of a transient nature. But this was not done. Badger stated that "The prices of preferred stocks today are predicated on fundamental conditions prevailing in the money markets, conditions which are of a permanent nature." He added that the values he placed upon the preferreds were "values of a permanent nature and . . . not values of a temporary or speculative nature." [44] His conclusion was supported by a summary

[44] The District Court made a finding with respect to Badger's conclusion as to the permanence of the current yield rate and concluded that "The extremely low money rates which resulted in Badger's finding that the preferred stocks of Engineers have an 'investment value' greater than $100 per share, largely reflect artificial factors which are clearly subject to changes at any time and may well be of purely transitory character." It is difficult to reconcile this "finding" with the following statement which appears in the court's published opinion: "I accept Dr. Badger's values and,

of the pertinent economic considerations, including the effects of Government financing and the large Government debt, together with a comparison of yields of Government bonds, high grade corporate bonds, and high grade preferred stocks from 1932 to 1945. Finally, Badger's analysis of Engineers' economic status, absent a Holding Company Act, of Engineers' preferred, and of comparable securities of other companies was thorough and adequate.

The Commission made its own independent study of Engineers' economic record. In evaluating Badger's testimony regarding the quality of Engineers' preferreds, the proper yield basis for the stock, and economic considerations underlying the prediction that current yields and price levels were relatively permanent, the Commission exercised its informed and expert judgment. At the time it passed upon the plan it was able to say that "no serious challenge was made in the proceedings to Badger's conclusion that the fair investment value of the preferred on a going concern basis is in excess of the call price." Holding Company Act Release No. 7041, p. 31. Engineers, in its brief before the Commission, conceded that "these amounts ($106.25, $111.38, $111.50, respectively) are substantially the present value or investment worth of these three series of stock, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities." *Ibid.* The Commission's determination that the investment values of the preferreds were in excess of their call prices has ample support in the record.

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in the absence of a showing of changed circumstances, I shall assume that those values are applicable at the present time." 71 F. Supp. at 801. At any rate, this is predominately a question of fact, and the Commission's determination, supported as it was by substantial evidence, should not have been disturbed, absent supervening economic developments prior to the consummation of the plan which clearly required reconsideration.

But the common stockholders contend that a drop in yield rates, caused by a lowering of support levels of Government securities, should be taken into consideration by this Court in appraising the Commission's determination. Any changes which had occurred since the date of consummation would of course be irrelevant, for the preferred stockholders could not be required to surrender their investment and their advantageous dividend rate and yet remain subjected to the risk of fluctuation in the value of their erstwhile investment. But the common stockholders have failed to show that the investment values of the preferreds have fallen below the call prices even after that date.[45]

An argument which has been variously articulated by the District Court, the Court of Appeals, and the common stockholders runs to the effect that the Commission's method of valuation, which assigned no value to the common stock, amounts to giving the preferred the investment value it would have had in the absence of a § 11 liquidation, while giving the common something less than its investment value apart from the liquidation. As the District Court phrased it, "The argument for payment of the premium is comparable to dealing cards off the top of a deck. When full hands (based on theoretical 'investment value') have been dealt to all the senior security holders, the common would merely get whatever happens to remain. Under the Act the interests of all investors must be considered." 71 F. Supp. at 802.[46]

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[45] The changes in interest rates which had occurred at the time of the decisions of the District Court and the Court of Appeals were merely cited to indicate that future changes might affect the accuracy of Badger's predictions.

[46] The Court of Appeals states that the Commission "made no finding as to the 'value' of the common stock," and that "the Commission ascribed 'investment value' to the preferreds but failed to make a similar approach to the common." 168 F. 2d at 737. Central-Illinois Securities Corporation and Christian A. Johnson, representing the common stockholders, complain that "the Commis-

The initial error in this argument is its assumption that the Commission deals from less than a full deck, that the impact of § 11 has caused losses to Engineers. For, if investment values have not been destroyed by the operation of § 11, giving the preferred stockholders the investment value of their shares will not deprive the common of any part of the investment value of their stock. We have already dealt with the hypothesis accepted by the District Court and the Court of Appeals that the impact of the Act prior to the liquidation involved here has caused losses by forcing the company to divest itself of its interests in numerous operating companies.[47]

In addition, however, it is said that value disappeared in the liquidation of Engineers itself, in spite of the fact that when Engineers' management came forward with a plan for the liquidation of Engineers, they had asserted that there was no economic justification for the continued existence of that corporation, in fact had characterized it as an "economic monstrosity." [48] In the light of the pres-

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sion's determination of the equitable equivalent of the rights surrendered by Engineers' stockholders failed utterly to take account of the correlative rights of the preferred and common."

[47] See note 38 and text, *supra*.

[48] The Commission stated in its opinion that "Engineers has produced an abundance of evidence showing that once it has disposed of El Paso and Gulf, it will have no reason to continue as a separate corporate entity for it would then be the parent of a single operating company, Virginia. In that situation, Engineers admits that it would be an 'economic monstrosity' and all participants in this proceeding seem to be in agreement with that conclusion. The record does not clearly indicate what it will cost to maintain Engineers after Gulf States and El Paso have been divested. Estimates range from $172,000 to $365,000 a year. The company freely admits that Engineers could in no way justify any such continuing expenditure. Virginia is able to undertake its own financing and service and is large enough to stand independently. Any functions Engineers might perform should more properly be carried out by Virginia's own management." Holding Company Act Release No. 7041, p. 18.

ent record it seems futile to argue that the dissolution of Engineers injured the common stockholders by depriving them of the so-called advantages of "leverage," [49] diversity of investment and a centralized management, arguments which, incidentally, were largely rejected by Congress at the time of the passage of the Act.[50] The record indicates

[49] "Leverage" is the term used to describe the advantage gained by junior interests through the rental of capital at a rate lower than the rate of return which they receive in the use of that borrowed capital. Assuming that the hypothetical Engineers could have used to advantage the $39,000,000 in capital supplied by the preferred stockholders, the Commission could properly have found that such "leverage" was not worth the risk that earnings might drop below the amount required to pay dividends on the preferred, thereby endangering the junior equity of $66,768,148 (the market value of the securities received by the common under the plan, as of the date of consummation, less the amount paid in the exercise of Gulf warrants).

In the light of the facts stated in the following quotation from the Commission's opinion, it is highly unlikely that the hypothetical Engineers would have had use for the capital supplied by the preferred stockholders: "The retirement of the preferred stock will be of immediate benefit to the common stockholders. As indicated above, the company at the time of the hearings had on hand idle treasury cash of over $14,650,000, while it is estimated that this sum will reach approximately $16,825,000 by the end of 1946. These funds have been accumulated through property dispositions and retained earnings. The management has pursued a policy of withholding dividends on the common stock until it is satisfied that the system has made all the adjustments that will be required of it under the Holding Company Act. As a consequence the company has now accumulated a large amount of idle funds while it continues to have outstanding three substantial issues of preferred stock having fixed dividend requirements. Under the circumstances the elimination of this prior charge is highly beneficial to the common." Holding Company Act Release No. 7041, p. 32.

[50] S. Rep. No. 621, 74th Cong., 1st Sess. 11–12; Additional Views by Representative Eicher, H. R. Rep. No. 1318, 74th Cong., 1st Sess. 46–47; Statement of House Managers, H. R. Rep. No. 1903, 74th Cong., 1st Sess. 70–71; Committee of Public Utility Executives, Summary of S. 2796, 74th Cong., 1st Sess., with Annotations, June, 1935, 5, 7.

that whatever tax advantage would be derived from reporting income on a consolidated basis was not commensurate with the cost of preserving Engineers.

Even if we could find that investment value had been destroyed by the liquidation of Engineers, or if we could find that the operation of the Act prior to the formulation of Engineers' plan had inflicted losses on the Engineers system and could take such losses into account, these facts would be irrelevant, except to the extent that such losses had impaired the investment value of Engineers' preferred by lowering its assets coverage or otherwise adversely affecting the economic prospects of the company apart from the Act. For the "fair and equitable" standard requires that, before the junior security holder may share, the senior security holder must receive the equitable equivalent of the rights surrendered, in this case the investment value. Since the investment value of the preferred must be measured in cash in this case, there is no occasion for "an examination of the correlative rights of the preferred and common stockholders." The rights of the common are not entitled to recognition until the rights of the preferred have been fully satisfied.

C. The District Court, with the apparent approval of the Court of Appeals, cast the standard of "fair and equitable" in the mold of "colloquial equities." Making payment of the preferred in excess of $100 per share unfair, it thought, were various "colloquial equities," which may or may not have had an incidental bearing on the investment value of the shares. The issuing price was one such factor. The "important consideration" was "not what the preferred security holders paid, but how much the company received for their stock," and since it was "practically certain" that the company received no more than $98 per share for any of the three series of preferreds and that the public paid no more than $100 per share, there was "no consideration of colloquial equity why the preferreds should be paid a premium." 71 F.

Supp. at 801. Other "colloquial equities" were the market history of the preferred,[51] the fact that earnings had been retained in the system, thus enhancing the value of the preferred at a sacrifice to the common,[52] and the hardship worked by the Act upon the common stock in the form of forced divestitures[53] and frustration of the enterprise.

In deciding the case on the assumption that "the inquiry is one of relative rights based on colloquial equity," and that the *Otis* case accorded participation to security holders "in accordance with the standard of colloquial equity," the District Court erred insofar as by "colloquial equities" it meant considerations which do not bear upon the investment or going-concern value the preferred would have absent the liquidation compelled by the Act. Congress, perhaps believing that the application of such an amorphous standard as that of "colloquial equity" was beyond the competence of courts and commissions, has instead prescribed the requirement that investment values be preserved.

IV.

The Escrow Arrangement. As we have stated, the plan has been consummated by the payment to the preferred of $100 per share, and the difference between the amount paid and the amount which would be payable under the plan approved by the Commission has been deposited in escrow, together with an amount sufficient to give the

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[51] See note 7, *supra.*

[52] Cf. *Continental Insurance Co.* v. *United States,* 259 U. S. 156, in which the principal issue was whether, when the charter provided that preferred and common should share equally on dissolution in the assets of the corporation, earnings retained in the systems should be regarded as assets and shared with the preferred in a dissolution forced by the antitrust laws. It was held that these retained earnings were assets and should be shared by the preferred.

[53] See note 38 and text *supra.*

preferred, during the period of the litigation, a return on the sum in escrow "measured by the return which would have been received by [the preferred stockholders] if the stock remained outstanding." [54] The preferred stockholders, who received $100 per share at the time of the consummation of the plan, will thus receive, on the additional $5 or $10 per share held in escrow, substantially the same return they would have derived by the retention of $5 or $10 worth of Engineers' preferred stock.

But the preferred stockholders contend that the plan should not have been consummated until such time as they were paid in full the amounts due them in satisfaction of their claims; that, in addition to the principal amount in escrow and interest thereon, they should receive an amount equal to dividends on the $100 per share received at the time of consummation, to the date of payment of the $5 or $10 held in escrow. Their argument is a technical one: it is said that the Commission actually applied the redemption provision to limit the amount of payment to them, since in the absence of that provision they would have been entitled to an investment value higher than the call prices; that by the terms of that provision the company had no right to terminate dividends except by payment of the full call prices. The answer is that the Commission did not apply the redemption provision, which, like the involuntary liquidation provision, was inoperative, but held that fairness required that the preferreds be paid no more than the

[54] In escrow is the sum of $4,000,000, comprised as follows: $3,204,795, which is equal to $5, $10, and $10 per share respectively of the three series of preferred; $484,325, which is an amount equal to simple interest for three years at the rate of 4.76% on the $5 preferred, 5% on the $5.50 preferred, and 5.45% on the $6 preferred; $310,880, which will cover all fees and other compensation and all remuneration or expenses claimed in connection with the plan.

call price, since the company could have called the stock at that price at any time, absent the Act.

The total sum in escrow is not sufficient to meet the preferred stockholders' demand. It is not apparent how they could recover the difference between the sum in escrow and the sum they claim in this proceeding. But we need not learn, for the escrow provision adopted by the District Court on the recommendation of the Commission in order to expedite consummation of the plan was fair to the preferred stockholders.[55] The $100 per share received at the time of the consummation of the plan could have been invested in comparable securities

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[55] The preferred stockholders object that the Commission failed to give them notice and an opportunity to be heard on the recommendation that an escrow be established. The escrow recommendation was made by way of an amending order, Holding Company Act Release No. 7190, and the Commission seems to have insisted throughout that its recommendation did not have the effect of amending the plan, but that the establishment of an escrow was within the power of the District Court. See note 13 *supra*. The District Court, which ordered the creation of the escrow, afforded the preferred stockholders a hearing on the propriety of that provision and upon whether the plan should be consummated prior to a final determination by the court of last resort of the amounts due the preferred stock. Applications for stay of consummation were denied in turn by the District Court, by the Court of Appeals and by a Justice of this Court. There was no occasion to hold a hearing on the question of whether the plan should be consummated by payment of $100 and the creation of an escrow at the time the Commission passed on the plan, for it approved the plan's provision for payment of $105 and $110. The necessity of deciding whether there should be consummation and an escrow first arose in the District Court. It was proper for the Commission, when it became apprised of determined opposition to the plan on the part of certain common stockholders, to recommend that the plan be consummated and that an escrow be created to protect the rights of the preferred, in the interest of expeditiously bringing the remnant of the Engineers system into compliance with the Act, without holding a hearing on the propriety of its recommendation. In the District Court and in the Court of Appeals, the preferred stockholders were accorded full hearing.

at the current rate of return. On the $5 or $10 per share held in escrow the preferred stockholders will receive, for the period between the date of consummation and the date of payment, a return which approximates the favorable rate of return they received on their preferred stock in Engineers. Their position is at least substantially the same as it would have been had they received $105 or $110 per share at the time of the consummation of the plan.

Our specific consideration has applied to the major features of difference between the Commission and the reviewing courts. In our opinion, in these respects, the Commission's action has not been contrary to law and its findings were sustained by adequate evidence. Consequently, in accordance with the views we have stated concerning the scope of judicial review, the Commission's order should have been sustained. We have considered other contentions advanced by the parties and find nothing in them which would warrant a different conclusion.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

APPENDIX.

SECURITIES AND EXCHANGE COMMISSION'S DEVELOPMENT AND APPLICATION OF INVESTMENT VALUE THEORY.*

The Commission first applied the investment value standard in a series of cases holding common stock entitled to participate with preferred in the new securities

*This Appendix is merely a summary of Commission decisions and does not purport to declare any rulings of law.

given to satisfy claims in the dissolving corporation, although in each case the book value of the corporation's assets was exceeded by the charter claims of the preferred.[1] This application of the standard was approved by this Court in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624. Satisfaction of preferred claims at less than their face amount by payment partly in cash and partly in new securities has also been approved by the Commission.[2] In other cases holding that, in the circumstances of the particular case, retirement of preferred stock having a call or voluntary liquidation price in excess of the involuntary liquidation price by payment in cash at the latter price is fair and equitable, the Commission has considered a number of factors other than charter provisions.[3]

In a number of contemporaneous cases, the Commission approved plans which provided for liquidation of bonds by payment in cash at the face amount of the bonds

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[1] *Community Power and Light Co.,* 6 S. E. C. 182; *Federal Water Service Corp.,* 8 S. E. C. 893; *United Power and Light Co.,* 13 S. E. C. 1 (the *Otis* case); *Puget Sound Power & Light Co.,* 13 S. E. C. 226; *Southern Colorado Power Co.,* Holding Company Act Release No. 4501; *Virginia Public Service Co.,* Holding Company Act Release No. 4618. These cases are discussed in Dodd, The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act, 57 Harv. L. Rev. 295. Commissioner Healy, who concurred in the result in the *Community Power Case,* dissented in the other cases, contending that the claim of the preferred was measured by the contract right. His view of the meaning of § 11 (e) led him to dissent in cases involving applications of the investment value rule which produced the results reached in this case. See text at note 6, *infra.*

[2] *New England Power Assn.,* Holding Company Act Release No. 6470, 66 F. Supp. 378, affirmed *sub nom. Lahti* v. *New England Power Assn.,* 160 F. 2d 845.

[3] *Cities Service Co.,* Holding Company Act Release No. 4944, pp. 16–17; *Georgia Power & Light Co.,* Holding Company Act Release No. 5568, pp. 16–17, 20–27.

without premium.[4] Even in the earliest of these cases, in addition to holding that the indenture provision requiring payment of a premium in the event of voluntary call was inapplicable, the Commission observed the absence of other legal or equitable considerations which might have made payment of a premium fair and equitable.[5] And in the later cases, the Commission's opinions "emphasized such circumstances, not articulated in the earlier cases, as the interest rate, maturity date, and risk factors incident to the particular security which is to be prepaid as bearing upon the fairness of the proposed discharge of the security." *American Power & Light Co.*, Holding Company Act Release No. 6176, p. 12.

In *American Power & Light Co.*, Holding Company Act Release No. 6176, the Commission applied the investment value theory to allow payment of premiums on bonds retired under compulsion of § 11 (e). After pointing out the trend observed in the preceding paragraph and attributing it to experience gained in considering a large number of cases, the Commission held that the investment value theory should be applied where its application resulted in the payment of the bonds at prices in excess of their face value. Commissioner Healy, who had persistently dissented in the line of cases finally approved by this Court in the *Otis* case,[6] dissented

[4] *The United Light and Power Co.*, 10 S. E. C. 1215, 1222, affirmed *sub nom. New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274; *North American Light & Power Co.*, 11 S. E. C. 820, 824, affirmed *sub nom. City National Bank & Trust Co.* v. *S. E. C.*, 134 F. 2d 65; *North Continent Utilities Corp.*, Holding Company Act Release No. 4686, p. 12, approved and enforced, 54 F. Supp. 527; *Consolidated Electric & Gas Co.*, Holding Company Act Release No. 4900, p. 7, approved and enforced, 57 F. Supp. 997, affirmed *sub nom. Massachusetts Mutual Life Insurance Co.* v. *S. E. C.*, 151 F. 2d 424.

[5] *The United Light and Power Co.*, 10 S. E. C. 1215, 1222; *North American Light & Power Co.*, 11 S. E. C. 820, 824.

[6] See note 1, *supra*.

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vigorously. He contended that the *Otis* case should be limited to its facts and that the earlier cases refusing to require payment of premiums on bonds should be taken as holding that payment of bonds at their face amount without premium "was fair because . . . contract rights were satisfied, not because the debentures were valued and found to be worth their principal." *Id.* at 46.[7] He thought it highly significant that a consistent application of the investment value standard would require retirement of bonds at less than their principal amount, in cases in which the bonds were not "worth their principal," and that the Commission had not suggested that its approach should extend so far. *Id.* at 47–48.[8]

Less than one year later the Commission made a parallel application of the investment value theory to a case involving the retirement of noncallable preferred stock, holding unfair a plan providing for the retirement of that stock by payment in cash equivalent to the liquidation preference. *The United Light and Power Co.*, Holding Company Act Release No. 6603. Commissioner Healy, who died November 16, 1946, dissented, stating for the last time his view that the claim should be paid at its liquidation preference, *i. e.*, that the contract controlled.[9] After this decision, in which the Commission

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[7] While contending that the majority's approach was not consistent with the cases refusing to allow premiums, he admitted "that a close reading of the Commission's opinions in those cases discloses some language which the investing public may or may not have realized vaguely heralded the present doctrine." Holding Company Act Release No. 6176 at p. 47.

[8] The Commission, in its brief in the case at bar, declines to predict what it would do if faced with the problem suggested by Commissioner Healy, asserting that much would depend on the exact nature of the security and the circumstances of the particular case.

[9] Commissioner Healy's position is explained in the following statement: "When I signed the Report of the National Power Policy

divided 3–2,[10] a rehearing was granted. While decision on rehearing was pending, the company proposed a substitute voluntary proposal, which the Commission approved. *United Light and Railways Co.*, Holding Company Act Release No. 7951.

The next application of the investment value theory employed by the Commission's majority was made in this case, decided December 5, 1946. Since this decision and the decision of the Court of Appeals on review, the Commission has again applied the investment value theory to require payment of preferred stock in cash at investment values equal to call prices. *Pennsylvania Edison Co.*, Holding Company Act Release No. 8550.

In a number of cases the Commission has approved plans which provided for the payment of preferred stock at call prices, where there was no contention that the premium was not payable.[11] But these cases have not been regarded as precedents in cases in which the company resists payment of the preferred stock or bonds in amounts in excess of the face value or involuntary liquidation price. *United Light and Power Co.*, 10 S. E. C. 1215, 1227.

Committee to President Roosevelt I understood the much quoted reference to preservation of investment values to refer to the values of operating company securities in holding company portfolios. I did not then and do not now believe it was intended as a basis for denying the senior security holders their full priority rights or for compelling common stockholders to pay premiums upon the redemption or retirement of senior securities forced by federal statute." *The United Light and Power Co.*, Holding Company Act Release No. 6603, pp. 43–44.

[10] Commissioner Caffrey thought the liquidation preference applicable for a reason irrelevant here. See *El Paso Electric Co.*, Holding Company Act Release No. 5499.

[11] E. g., *Minnesota Power & Light Co.*, Holding Company Act Release No. 5850; *Mississippi River Power Co.*, Holding Company Act Release No. 5776; *The North American Co.*, Holding Company Act Release No. 5796.

BRINEGAR *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 12. Argued October 18–19, 1948.—Decided June 27, 1949.

Petitioner was convicted in a federal district court for a violation of the Liquor Enforcement Act of 1936, on charges of transporting intoxicating liquor into Oklahoma contrary to the laws of that State. He challenged the validity of his conviction because of the use in evidence against him of liquor seized in a search of his automobile without a warrant and allegedly in violation of the Fourth Amendment. At the hearing on petitioner's motion to suppress this evidence, it appeared that one of the federal agents who made the search and seizure had arrested petitioner five months previously for illegally transporting liquor; that he had twice seen petitioner loading liquor into a car or truck in Missouri, where the sale of liquor was legal; and that he knew petitioner had a reputation for hauling liquor. This officer, accompanied by another, recognized petitioner and his car, which appeared to be heavily loaded, going west in Oklahoma not far from the Missouri line. They gave chase, overtook petitioner, and forced his car to the side of the road. Upon interrogation, petitioner admitted that he had twelve cases of liquor in his car, whereupon the officers searched the car, seized the liquor and arrested petitioner. *Held:*

1. The facts taking place before petitioner made the incriminating statements were sufficient to show probable cause for the search, and the evidence seized was admissible against petitioner at the trial. *Carroll* v. *United States*, 267 U. S. 132, followed. Pp. 165–171.

2. The officer's knowledge that petitioner was engaging in illicit liquor-running was not based wholly or largely on surmise or hearsay; the facts derived from his personal observation were sufficient in themselves, without the hearsay concerning general reputation, to sustain his conclusion concerning the illegal character of petitioner's operations. P. 172.

3. It was not improper to admit as evidence on the issue of probable cause the fact that the officer had arrested the petitioner several months before for illegal transportation of liquor, although the identical evidence was properly excluded at the trial on the issue of guilt. Pp. 172–174.

4. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed. Pp. 175–176.

165 F. 2d 512, affirmed.

Petitioner was convicted in the federal district court for a violation of the Liquor Enforcement Act. The Court of Appeals affirmed. 165 F. 2d 512. This Court granted certiorari. 333 U. S. 841. *Affirmed,* p. 178.

Irving E. Ungerman argued the cause for petitioner. With him on the brief was *Leslie L. Conner.*

Stanley M. Silverberg argued the cause for the United States. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Beatrice Rosenberg* were on the brief.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Brinegar was convicted of importing intoxicating liquor into Oklahoma from Missouri in violation of the federal statute which forbids such importation contrary to the laws of any state.[1] His conviction was based in

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[1] Section 3 (a) of the Liquor Enforcement Act of 1936, 49 Stat. 1928, 27 U. S. C. § 223, provides: "Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both." Okla. Sess. Laws, 1939, c. 16,

part on the use in evidence against him of liquor seized from his automobile in the course of the alleged unlawful importation.

Prior to the trial Brinegar moved to suppress this evidence as having been secured through an unlawful search and seizure.[2] The motion was denied, as was a renewal of the objection at the trial.

The Court of Appeals affirmed the conviction, 165 F. 2d 512, and certiorari was sought solely on the ground that the search and seizure contravened the Fourth Amendment and therefore the use of the liquor in evidence vitiated the conviction. We granted the writ to determine this question. 333 U. S. 841.

The facts are substantially undisputed. At about six o'clock on the evening of March 3, 1947, Malsed, an investigator of the Alcohol Tax Unit, and Creehan, a special investigator, were parked in a car beside a highway near the Quapaw Bridge in northeastern Oklahoma. The point was about five miles west of the Missouri-Oklahoma line. Brinegar drove past headed west in his Ford coupe. Malsed had arrested him about five months earlier for illegally transporting liquor; had seen him loading liquor into a car or truck in Joplin, Missouri, on at least two occasions during the preceding six months; and knew him to have a reputation for hauling liquor. As Brinegar passed, Malsed recognized both him and the Ford. He told Creehan, who was driving the officers' car, that

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Art. 1, § 1, in effect at the time of petitioner's arrest, made it unlawful to import or cause to be imported into that state, without a permit, any intoxicating liquor containing more than 4 per cent of alcohol by volume.

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amend. IV.

Brinegar was the driver of the passing car. Both agents later testified that the car, but not especially its rear end, appeared to be "heavily loaded" and "weighted with something." Brinegar increased his speed as he passed the officers. They gave chase. After pursuing him for about a mile at top speed, they gained on him as his car skidded on a curve, sounded their siren, overtook him, and crowded his car to the side of the road by pulling across in front of it. The highway was one leading from Joplin, Missouri, toward Vinita, Oklahoma, Brinegar's home.

As the agents got out of their car and walked back toward petitioner, Malsed said, "Hello, Brinegar, how much liquor have you got in the car?" or "How much liquor have you got in the car this time?" Petitioner replied, "Not too much," or "Not so much." After further questioning he admitted that he had twelve cases in the car. Malsed testified that one case, which was on the front seat, was visible from outside the car, but petitioner testified that it was covered by a lap robe. Twelve more cases were found under and behind the front seat. The agents then placed Brinegar under arrest and seized the liquor.

The district judge, after a hearing on the motion to suppress at which the facts stated above appeared in evidence, was of the opinion that "the mere fact that the agents knew that this defendant was engaged in hauling whiskey, even coupled with the statement that the car appeared to be weighted, would not be probable cause for the search of this car." Therefore, he thought, there was no probable cause when the agents began the chase. He held, however, that the voluntary admission made by petitioner after his car had been stopped constituted probable cause for a search, regardless of the legality of the arrest and detention, and that therefore the evidence was admissible. At the trial, as has been said, the court overruled petitioner's renewal of the objection.

The Court of Appeals, one judge dissenting, took essentially the view held by the District Court. The dissenting judge thought that the search was unlawful and therefore statements made during its course could not justify the search.

The crucial question is whether there was probable cause for Brinegar's arrest, in the light of prior adjudications on this problem, more particularly *Carroll* v. *United States*, 267 U. S. 132, which on its face most closely approximates the situation presented here.[3]

The *Carroll* decision held that, under the Fourth Amendment, a valid search of a vehicle moving on a public highway may be had without a warrant, but only if probable cause for the search exists.[4] The Court then went on to rule that the facts presented amounted to probable cause for the search of the automobile there involved. 267 U. S. 132, 160.

In the *Carroll* case three federal prohibition agents and a state officer stopped and searched the defendants' car on a highway leading from Detroit to Grand Rapids, Michigan, and seized a quantity of liquor discovered in the search. About three months before the search, the two defendants and another man called on two of the agents at an apartment in Grand Rapids and, unaware that they were dealing with federal agents, agreed to sell one of the agents three cases of liquor. Both agents noticed the Oldsmobile roadster in which the three men came to the

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[3] Neither the opinion of the Court of Appeals nor the unpublished opinion of the trial court refers to the *Carroll* case.

[4] "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable. . . . On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." *Carroll* v. *United States*, 267 U. S. 132, 147, 149.

apartment and its license number. Presumably because the official capacity of the proposed purchaser was suspected by the defendants, the liquor was never delivered.

About a week later the same two agents, while patrolling the road between Grand Rapids and Detroit on the lookout for violations of the National Prohibition Act, were passed by the defendants, who were proceeding in a direction from Grand Rapids toward Detroit in the same Oldsmobile roadster. The agents followed the defendants for some distance but lost trace of them. Still later, on the occasion of the search, while the officers were patrolling the same highway, they met and passed the defendants, who were in the same roadster, going in a direction from Detroit toward Grand Rapids. Recognizing the defendants, the agents turned around, pursued them, stopped them about sixteen miles outside Grand Rapids, searched their car and seized the liquor it carried.

This Court ruled that the information held by the agents, together with the judicially noticed fact that Detroit was "one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior" (267 U. S. at 160), constituted probable cause for the search.

I.

Obviously the basic facts held to constitute probable cause in the *Carroll* case were very similar to the basic facts here. In each case the search was of an automobile moving on a public highway and was made without a warrant by federal officers charged with enforcing federal statutes outlawing the transportation of intoxicating liquors (except under conditions not complied with).[5]

[5] The substantive offense charged in *Carroll* was violation of the National Prohibition Act, 41 Stat. 305; here, violation of the Liquor Enforcement Act of 1936.

In each instance the officers were patrolling the highway in the discharge of their duty. And in each before stopping the car or starting to pursue it they recognized both the driver and the car, from recent personal contact and observation, as having been lately engaged in illicit liquor dealings.[6] Finally, each driver was proceeding in his identified car in a direction from a known source of liquor supply toward a probable illegal market, under circumstances indicating no other probable purpose than to carry on his illegal adventure.[7]

These are the ultimate facts. Necessarily the concrete, subordinate facts on which they were grounded in the two cases differed somewhat in detail. The more important of the variations in details of the proof are as follows:

In *Carroll* the agent's knowledge of the primary and ultimate fact that the accused were engaged in liquor running was derived from the defendants' offer to sell liquor to the agents some three months prior to the search, while here that knowledge was derived largely from Malsed's personal observation, reinforced by hearsay; the officers when they bargained for the liquor in *Carroll* saw the number of the defendants' car, whereas no such fact is shown in this record; and in *Carroll* the Court took judicial notice that Detroit was on the international boundary and an active center for illegal impor-

[6] In this case identification of the car as having been previously used by Brinegar in his liquor-running activities was inferential, although identification of its use by him in Joplin, Mo., his source of supply, was direct and undisputed.

[7] The Government also stresses the fact, not present in the *Carroll* case, of flight by Brinegar after he realized he was being pursued. We find it is unnecessary to take account of this factor in deciding this case. As to the factor of flight, see *Husty* v. *United States*, 282 U. S. 694, 700–701; *Talley* v. *United States*, 159 F. 2d 703; *United States* v. *Heitner*, 149 F. 2d 105, 107; *Jones* v. *United States*, 131 F. 2d 539, 541; *Levine* v. *United States*, 138 F. 2d 627, 629.

tation of spirituous liquors for distribution into the interior, while in this case the facts that Joplin, Missouri, was a ready source of supply for liquor and Oklahoma a place of likely illegal market were known to the agent Malsed from his personal observation and experience as well as from facts of common knowledge.

Treating first the two latter and less important matters, in view of the positive and undisputed evidence concerning Malsed's identification of Brinegar's Ford, we think no significance whatever attaches, for purposes of distinguishing the cases, to the fact that in the *Carroll* case the officers saw and recalled the license number of the offending car while this record discloses no like recollection.

Likewise it is impossible to distinguish the *Carroll* case with reference to the proof relating to the source of supply, the place of probable destination and illegal market, and consequently the probability that the known liquor operators were using the connecting highway for the purposes of their unlawful business.

There were of course some legal as well as some factual differences in the two situations. Under the statute in review in *Carroll* the whole nation was legally dry. Not only the manufacture, but the importation, transportation and sale of intoxicating liquors were prohibited throughout the country. Under the statute now in question only the importation of such liquors contrary to the law of the state into which they are brought and in which they were seized is forbidden.

In the *Carroll* case the Court judicially noticed that Detroit was located on the international boundary with Canada and had become an active center for illegally bringing liquor into the country for distribution into the interior. This was pertinent in connection with other circumstances, for showing the probability under which the agents acted that use of the highway connecting

Detroit and Grand Rapids by the known operators in liquor was for the purpose of carrying on their unlawful traffic.

In this case, the record shows that Brinegar had used Joplin, Missouri, to Malsed's personal knowledge derived from direct observation, not merely from hearsay as seems to be suggested, as a source of supply on other occasions within the preceding six months. It also discloses that Brinegar's home was in Vinita, Oklahoma, and that Brinegar when apprehended was traveling in a direction leading from Joplin to Vinita, at a point about four or five miles west of the Missouri-Oklahoma line.

Joplin, like Detroit in the *Carroll* case, was a ready source of supply. But unlike Detroit it was not an illegal source. So far as appears, Brinegar's purchases there were entirely legal. And so, we may assume for present purposes, was his transportation of the liquor in Missouri, until he reached and crossed the state line into Oklahoma.

This difference, however, is insubstantial. For the important thing here is not whether Joplin was an illegal source of supply; it is rather that Joplin was a ready, convenient and probable one for persons disposed to violate the Oklahoma and federal statutes. That fact was demonstrated fully, not only by the geographic facts, but by Malsed's direct and undisputed testimony of his personal observation of Brinegar's use of liquor-dispensing establishments in Joplin for procuring his whiskey. Such direct evidence was lacking in *Carroll* as to Detroit, and for that reason the Court resorted to judicial notice of the commonly known facts to supply that deficiency. Malsed's direct testimony, based on his personal observation, dispensed with that necessity in this case.

The situation relating to the probable place of market, as bearing on the probability of unlawful importation, is somewhat different. Broadly on the facts this may well have been taken to be the State of Oklahoma as a

whole or its populous northeastern region. From the facts of record we know, as the agents knew, that Oklahoma was a "dry" state. At the time of the search, its law forbade the importation of intoxicating liquors from other states, except under a permit not generally procurable [8] and which there is no pretense Brinegar had secured or attempted to secure. This fact, taken in connection with the known "wet" status of Missouri and the location of Joplin close to the Oklahoma line, affords a very natural situation for persons inclined to violate the Oklahoma and federal statutes to ply their trade. The proof therefore concerning the source of supply, the place of probable destination and illegal market, and hence the probability that Brinegar was using the highway for the forbidden transportation, was certainly no less strong than the showing in these respects in the *Carroll* case.[9]

Finally, as for the most important potential distinction, namely, that concerning the primary and ultimate fact that the petitioner was engaging in liquor running, Malsed's personal observation of Brinegar's recent activities established that he was so engaged quite as effectively as did the agent's prior bargaining with the defendants in the *Carroll* case. He saw Brinegar loading liquor, in

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[8] It was unlawful to import into Oklahoma, without a permit, any intoxicating liquor, as defined by the laws of that state, containing more than four per cent of alcohol by volume. See note 1 *supra.* Manufacture, sale, furnishing or transportation of intoxicating liquor was forbidden in Oklahoma. 37 Okla. Stat. § 1 (1941).

[9] Indeed the showing here was stronger because there was no necessity, as there was in the *Carroll* case, for resorting to judicial notice to establish either the probable source of supply or that it was illegal. On the present record judicial notice is hardly needed to give us cognizance of the differing laws of Missouri and Oklahoma, or of Joplin's proximity to the state line, and its ready convenience to one living as near by as Vinita who might be disposed to use it as a base of supply for importing liquor into Oklahoma in violation of the state and federal statutes.

larger quantities than would be normal for personal consumption, into a car or a truck in Joplin on other occasions during the six months prior to the search. He saw the car Brinegar was using in this case in use by him at least once in Joplin within that period and followed it. And several months prior to the search he had arrested Brinegar for unlawful transportation of liquor and this arrest had resulted in an indictment which was pending at the time of this trial. Moreover Malsed instantly recognized Brinegar's Ford coupe and Brinegar as the driver when he passed the parked police car. And at that time Brinegar was moving in a direction from Joplin toward Vinita only a short distance inside Oklahoma from the state line.

All these facts are undisputed. Wholly apart from Malsed's knowledge that Brinegar bore the general reputation of being engaged in liquor running, they constitute positive and convincing evidence that Brinegar was engaged in that activity, no less convincing than the evidence in *Carroll* that the defendants had offered to sell liquor to the officers. The evidence here is undisputed, is admissible on the issue of probable cause, and clearly establishes that the agent had good ground for believing that Brinegar was engaged regularly throughout the period in illicit liquor running and dealing.

Notwithstanding the variations in detail, therefore, we think the proof in this case furnishes support quite as strong as that made in the *Carroll* case, indeed stronger in some respects, to sustain the ultimate facts there held in the aggregate to constitute probable cause for a search identical in all substantial and material respects with the one made here. Nothing in the variations of detail affords a substantial basis for undermining here any of the ultimate facts held to be sufficient in *Carroll* or for distinguishing the cases. Each of the ultimate facts found in *Carroll* to constitute probable cause, when taken to-

gether, is present in this case and is fully substantiated by the proof. Accordingly the *Carroll* decision must be taken to control this situation, unless it is now to be overruled.

This is true, although the trial court and the Court of Appeals, including the dissenting judge, were of the opinion, as stated by the latter court, "that the facts within the knowledge of the investigators and of which they had reasonable trustworthy information prior to the time the incriminating statements were made by Brinegar were not sufficient to lead a reasonably discreet and prudent man to believe that intoxicating liquor was being transported in the coupe, and did not constitute probable cause for a search." 165 F. 2d at 514. If, as we think, the *Carroll* case is indistinguishable from this one on the material facts, and that decision is to continue in force, it necessarily follows that the quoted "finding" or "conclusion" was erroneous.[10] In the absence of any significant difference in the facts, it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.

II.

It remains to consider one further asserted difference between this case and the *Carroll* case, having to do with the admissibility or inadmissibility at the trial of the evidence on which the agents acted in making the search, particularly the evidence concerning their knowledge that the defendants were engaging in illicit liquor running.

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[10] As has been noted above, the *Carroll* case is neither cited nor referred to in any of the opinions filed in the trial court and the Court of Appeals. Nor is there anything in the record before us showing that the *Carroll* decision was considered in any of the rulings made in the hearing on the motion to suppress, at the trial, or in the Court of Appeals.

It is argued first that this case can be distinguished from *Carroll* because Malsed's knowledge of this primary and ultimate fact rested wholly or largely on surmise or hearsay. This argument is disproved by the facts of record which we have set forth above. There was hearsay, but there was much more. Indeed, as we have emphasized, the facts derived from Malsed's personal observations were sufficient in themselves, without the hearsay concerning general reputation, to sustain his conclusion concerning the illegal character of Brinegar's operations.

But a further distinction based upon inadmissibility of the evidence is asserted. It is said that, while in *Carroll* the defendants' offer to sell liquor to the agents was admissible and was admitted at the trial, here the evidence that Malsed had arrested Brinegar for illegal transportation of liquor several months before the search, though admitted on the hearing on the motion to suppress, was excluded at the trial. Cf. *Michelson* v. *United States*, 335 U. S. 469. The inference seems to be that the evidence concerning the prior arrest should not have been received at the hearing on the motion. In any event, the conclusion is drawn that the factors relating to inadmissibility of the evidence here, for purposes of proving guilt at the trial, deprive the evidence as a whole of sufficiency to show probable cause for the search and therefore distinguish this case from the *Carroll* case.

Apart from its failure to take account of the facts disclosed by Malsed's direct and personal observation, even if his testimony concerning the prior arrest were excluded, the so-called distinction places a wholly unwarranted emphasis upon the criterion of admissibility in evidence, to prove the accused's guilt, of the facts relied upon to show probable cause. That emphasis, we think, goes much too far in confusing and disregarding

the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. It approaches requiring (if it does not in practical effect require) proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them.

For a variety of reasons relating not only to probative value and trustworthiness, but also to possible prejudicial effect upon a trial jury and the absence of opportunity for cross-examination, the generally accepted rules of evidence throw many exclusionary protections about one who is charged with and standing trial for crime. Much evidence of real and substantial probative value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury.

Thus, in this case, the trial court properly excluded from the record at the trial, cf. *Michelson* v. *United States,* 335 U. S. 469, Malsed's testimony that he had arrested Brinegar several months earlier for illegal transportation of liquor and that the resulting indictment was pending in another court at the time of the trial of this case. This certainly was not done on the basis that the testimony concerning arrest, or perhaps even the indictment, was surmise or hearsay or that it was without probative value. Yet the same court admitted the testimony at the hearing on the motion to suppress the evidence seized in the search, where the issue was not guilt but probable cause and was determined by the court without a jury.[11]

[11] The court however thought that, even with the fact of the arrest before it, the evidence was insufficient to show probable cause at the time Brinegar passed the police car.

The court's rulings, one admitting, the other excluding the identical testimony, were neither inconsistent nor improper. They illustrate the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt. Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

However, if those standards were to be made applicable in determining probable cause for an arrest or for search and seizure, more especially in cases such as this involving moving vehicles used in the commission of crime, few indeed would be the situations in which an officer, charged with protecting the public interest by enforcing the law, could take effective action toward that end.[12] Those standards have seldom been so applied.[13]

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[12] The inappropriateness of applying the rules of evidence as a criterion to determine probable cause is apparent in the case of an application for a warrant before a magistrate, the context in which the issue of probable cause most frequently arises. The ordinary rules of evidence are generally not applied in *ex parte* proceedings, "partly because there is no opponent to invoke them, partly because the judge's determination is usually discretionary, partly because it is seldom final, but mainly because the system of Evidence rules was devised for the special control of trials by jury." 1 Wigmore, Evidence (3d ed., 1940) 19. See also Note, 46 Harv. L. Rev. 1307, 1310–1311.

[13] But see, e. g., *Grau* v. *United States,* 287 U. S. 124, 128, in which it was said by way of *dictum* that "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States,* 284 Fed. 208; *Wagner* v. *United States,* 8 F. (2d) 581 . . . ." For this proposition there was no authority in the decisions of this Court. It was stated in a case in

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

"The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy* v. *De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U. S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate,[14] it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the

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which the evidence adduced to prove probable cause was not incompetent, but was insufficient to support the inference necessary to the existence of probable cause. The statement has not been repeated by this Court.

The *Wagner* case relies solely upon *Giles,* the other case cited in *Grau,* and holds a warrant bad which issued on the basis of "hearsay and conclusions." The *Grau* dictum occasionally has been applied or stated as dictum by the courts of appeals and district courts: *Simmons* v. *United States,* 18 F. 2d 85, 88; *Worthington* v. *United States,* 166 F. 2d 557, 564–565; see also *Reeve* v. *Howe,* 33 F. Supp. 619, 622; *United States* v. *Novero,* 58 F. Supp. 275, 279. Cf. *Davis* v. *United States,* 35 F. 2d 957. See Note, 46 Harv. L. Rev. 1307, 1310–1311, for a criticism of the *Grau* dictum. And see note 15, *infra,* and text.

[14] Marshall's full statement in *Locke* v. *United States* was: "It may be added, that the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion." 7 Cranch 339, 348.

belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162.[15]

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

The troublesome line posed by the facts in the *Carroll* case and this case is one between mere suspicion and probable cause. That line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances. No problem of searching the home or any other place of privacy was presented either in *Carroll* or here. Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be un-

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[15] To the same effect are: *Husty* v. *United States,* 282 U. S. 694, 700–701; *Dumbra* v. *United States,* 268 U. S. 435, 441; *Steele* v. *United States No. 1,* 267 U. S. 498, 504–505; *Stacey* v. *Emery,* 97 U. S. 642, 645.

The *Carroll* opinion also quotes with approval the following statement: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." P. 161. Ascription of the statement to *Locke* v. *United States,* 7 Cranch 339, appears to be an error in citation.

molested by investigation and search in those movements. In such a case the citizen who has given no good cause for believing he is engaged in that sort of activity is entitled to proceed on his way without interference.[16] But one who recently and repeatedly has given substantial ground for believing that he is engaging in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs.

This does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion.[17] The question presented in the *Carroll* case lay on the border between suspicion and probable cause. But the Court carefully considered that problem and resolved it by concluding that the facts within the officers' knowledge when they intercepted the *Carroll* defendants amounted to more than mere suspicion and constituted probable cause for their action. We cannot say this conclusion was wrong, or was so lacking in reason and consistency with the Fourth Amendment's purposes that it

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[16] See the discussion of exceptions in the *Carroll* opinion, 267 U. S. 132, 149 ff.

[17] "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Carroll* v. *United States,* 267 U. S. 132, 153–154.

should now be overridden. Nor, as we have said, can we find in the present facts any substantial basis for distinguishing this case from the *Carroll* case.

Accordingly the judgment is

Affirmed.

MR. JUSTICE BURTON, concurring.

I join in the opinion of the Court that there was probable cause for the search within the standards established in *Carroll* v. *United States,* 267 U. S. 132.

Whether or not the necessary probable cause for a search of the petitioner's car existed *before* the government agents caught up with him and said to him, "How much liquor have you got in the car this time?" and he replied, "Not too much," it is clear, and each of the lower courts found, that, under all of the circumstances of this case, the necessary probable cause for the search of the petitioner's car *then* existed. If probable cause for the search existed at that point, the search which then was begun was lawful without a search warrant as is demonstrated in the opinion of the Court. That search disclosed that a crime was in the course of its commission in the presence of the arresting officers, precisely as those officers had good reason to believe was the fact. The ensuing arrest of the petitioner was lawful and the subsequent denial of his motion to suppress the evidence obtained by the search was properly sustained.

It is my view that it is not necessary, for the purposes of this case, to establish probable cause for the search at any point earlier than that of the above colloquy. The earlier events, recited in the opinion of the Court, disclose at least ample grounds to justify the chase and official interrogation of the petitioner by the government agents in the manner adopted. This interrogation quickly disclosed indisputable probable cause for the search and for the arrest. In my view, these earlier events not only justified the steps taken by the govern-

ment agents but those events imposed upon the government agents a positive duty to investigate further, in some such manner as they adopted. It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the presence of the agent. Prompt investigation may then not only discover but, what is still more important, may interrupt the crime and prevent some or all of its damaging consequences.

In the present case, from the moment that the agents saw this petitioner driving his heavily laden car in Oklahoma, evidently en route from Missouri, the events justifying and calling for an interrogation of him rapidly gained cumulative force. Nothing occurred that even tended to lessen the reasonableness of the original basis for the suspicion of the agents that a crime within their particular line of duty was being committed in their presence. Nothing occurred to make it unlawful for them, in line of duty, to make the interrogation which suggested itself to them. When their interrogation of the petitioner led to his voluntary response as quoted above, that response demonstrated ample probable cause for an immediate search of the petitioner's car for the contraband liquor which he had indicated might be found there. The interrogation of the petitioner, thus made by the agents in their justifiable investigation of a crime reasonably suspected by them to be in the course of commission in their presence, cannot now be resorted to by the petitioner in support of a motion to suppress the evidence of that crime. Government agents have duties of crime

prevention and crime detection as well as the duty of arresting offenders caught in the commission of a crime or later identified as having committed a crime. The performance of the first duties are as important as the performance of the last. In this case the performance of the first halted the commission of the crime and also resulted in the arrest of the offender.

MR. JUSTICE JACKSON, dissenting.

When this Court recently has promulgated a philosophy that some rights derived from the Constitution are entitled to "a preferred position," *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115, dissent at p. 166; *Saia* v. *New York,* 334 U. S. 558, 562, I have not agreed. We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds. Indications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position.

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality

deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. Federal courts have used this method of enforcement of the Amendment, in spite of its unfortunate consequences on law enforcement, although many state courts do not. This inconsistency does not disturb me, for local excesses or invasions of liberty are more amenable to political correction, the Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source. We must therefore look upon the exclusion of evidence in federal prosecutions, if obtained in violation of the Amendment, as a means of extending protection against the central government's agencies. So a search against Brinegar's car must be regarded as a search of the car of Everyman.

We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money.

But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.

And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies.

With this prologue I come to the case of Brinegar. His automobile was one of his "effects" and hence within the express protection of the Fourth Amendment. Undoubtedly the automobile presents peculiar problems for enforcement agencies, is frequently a facility for the perpetration of crime and an aid in the escape of criminals.

But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

The Court sustains this search as an application of *Carroll* v. *United States,* 267 U. S. 132. I dissent because I regard it as an extension of the *Carroll* case, which already has been too much taken by enforcement officers as blanket authority to stop and search cars on suspicion. I shall confine this opinion to showing the several ways in which this decision seems to expand the already expansive right to stop and search automobiles.

In the first place, national prohibition legislation was found in the *Carroll* case to have put congressional authority back of the search without warrant of cars suspected of its violation. No such congressional authority exists in this case. The Court is voluntarily dispensing with warrant in this case as matter of judicial policy, while in the *Carroll* case the Court could have required a warrant only by holding an Act of Congress unconstitutional.[1]

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[1] The *Carroll* case was based on the National Prohibition Act, 41 Stat. 305. Section 26 of that statute provided that when an officer discovered any person transporting liquor in violation of the law, in any vehicle, it was the officer's duty to seize the liquor, take possession of the vehicle, and arrest any person found in charge

A second and important distinction is that in the *Carroll* case the lower court had found that the evidence showed probable cause for that search, while in this case two courts below have held that (except for evidence turned up after the search, which we consider later) there was not probable cause. If we assume the facts to be indistinguishable, this important distinction emerges from the decisions: *Carroll* held only that these facts *permitted* a District Court, if so convinced, to find probable cause from them. The Court now holds these facts *require* a finding of probable cause. This shift from a permissive to a mandatory basis is a shift of no inconsiderable significance.

While the Court sustained the search without warrant in the *Carroll* case, it emphatically declined to dispense with the necessity for evidence of probable cause for making such a search. It said: "It would be intolerable and unreasonable if a prohibition agent were authorized to

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thereof. The officer was required to proceed at once against any such person but, if no one was found claiming the vehicle, it was to be sold after appropriate notice and the proceeds paid into the Treasury. Section 25 of the Act authorized search warrants for private dwellings but only if they were being used in the illicit liquor business.

It had been proposed to amend the statute to forbid search of an automobile without warrant. After disagreement between the House and the Senate, that restriction was finally rejected. In the *Carroll* case, the legislative history of this proposed (Stanley) amendment was considered at length. 267 U. S. 144–146. The Court then concluded, 267 U. S. 147, that, without the amendment, the Act "left the way open for searching an automobile . . . without a warrant, if the search was not malicious or without probable cause." And it stated the issue thus: "The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles is [*sic*] the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? . . ."

stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U. S. 132 at 153.

Analysis of the *Carroll* facts shows that while several facts are common to the two cases, the settings from which those facts take color and meaning differ in essential respects.

In the *Carroll* case, the primary and the ultimate fact that the accused was engaged in liquor running was not surmise or hearsay, as it is here. Carroll and his companion, some time before their arrest, had come to meet the two arresting officers, not then known as officials, upon the understanding that they were customers wanting liquor. Carroll promised to sell and deliver them three cases at $130 a case. For some reason there was a failure to deliver, but when the officers arrested them they had this positive and personal knowledge that these men were trafficking in liquor. Also, it is to be noted that the officers, when bargaining for liquor, saw and learned the number of the car these bootleggers were using in the business and, at the time of the arrest, recognized it as the same car.

Then this Court took judicial notice that the place whence Carroll, when stopped, was coming, on the international boundary, "is one of the most active centers

for introducing illegally into this country spirituous liquors for distribution into the interior." 267 U. S. at 160. These facts provided the very foundation of the opinion of this Court on the subject of probable cause, which it summed up as follows:

"The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whiskey to the officers which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids where they plied their trade. That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so." 267 U. S. at 160.

Not only did the Court rely almost exclusively on information gained in personal negotiations of the officers to buy liquor from defendants to show probable cause, but the dissenting members asserted it to be the only circumstance which could have subjected the accused to any reasonable suspicion. And that is the sort of direct evidence on personal knowledge that is lacking here.

In contrast, the proof that Brinegar was trafficking in illegal liquor rests on inferences from two circumstances, neither one of which would be allowed to be proved at a trial: One, it appears that the same officers previously had arrested Brinegar on the same charge. But there had been no conviction and it does not appear whether the circumstances of the former arrest indicated any strong probability of it. In any event, this evidence of a prior arrest of the accused would not even be admissible in a trial to prove his guilt on this occasion.

As a second basis for inference, the officers also say that Brinegar had the reputation of being a liquor runner. The weakness of this hearsay evidence is revealed by con-

trasting it with the personal negotiations which proved that Carroll was one. The officers' testimony of reputation would not be admissible in a trial of defendant unless he was unwise enough to open the subject himself by offering character testimony. See *Greer* v. *United States,* 245 U. S. 559, 560.

I do not say that no evidence which would be inadmissible to prove guilt at a trial may be considered in weighing probable cause, but I am surprised that the Court is ready to rule that inadmissible evidence alone, as to vital facts without which other facts give little indication of guilt, establish probable cause as matter of law. The only other fact is that officer Malsed stated that twice, on September 23 and on September 30, about six months before this arrest, he saw Brinegar in a Missouri town, where liquor is lawful, loading liquor into a truck, not the car in this case. That is all. The Court from that draws the inference which the courts below, familiar we presume with the local conditions, refused to draw, *viz.,* that to be seen loading liquor into a truck where it is lawful is proof that defendant is unlawfully trafficking in liquor some distance away. There is not, as in the *Carroll* case, evidence that he was offering liquor for sale to anybody at any time. In the *Carroll* case, the offer to sell liquor to the officers would itself have been a law violation. It seems rather foggy reasoning to say that the courts are obliged to draw the same conclusion from legal conduct as from illegal conduct.

I think we cannot say the lower courts were wrong as matter of law in holding that there was no probable cause up to the time the car was put off the road and stopped, and that we cannot say it was proper to consider the deficiency supplied by what followed. When these officers engaged in a chase at speeds dangerous to those who participated, and to other lawful wayfarers, and ditched the defendant's car, they were either taking the

initial steps in arrest, search and seizure, or they were committing a completely lawless and unjustifiable act. That they intended to set out on a search is unquestioned, and there seems no reason to doubt that in their own minds they thought there was cause and right to search. They have done exactly what they would have done, and done rightfully, if they had been executing a warrant. At all events, whatever it may have lacked technically of arrest, search and seizure, it was a form of coercion and duress under color of official authority—and a very formidable type of duress at that.

I do not, of course, contend that officials may never stop a car on the highway without the halting being considered an arrest or a search. Regulations of traffic, identifications where proper, traffic census, quarantine regulations, and many other causes give occasion to stop cars in circumstances which do not imply arrest or charge of crime. And to trail or pursue a suspected car to its destination, to observe it and keep it under surveillance, is not in itself an arrest nor a search. But when a car is forced off the road, summoned to stop by a siren, and brought to a halt under such circumstances as are here disclosed, we think the officers are then in the position of one who has entered a home: the search at its commencement must be valid and cannot be saved by what it turns up. *Johnson* v. *United States,* 333 U. S. 10; *McDonald* v. *United States,* 335 U. S. 451; and see *Nueslein* v. *District of Columbia,* 73 App. D. C. 85, 115 F. 2d 690.

The findings of the two courts below make it clear that this search began and proceeded through critical and coercive phases without the justification of probable cause. What it yielded cannot save it. I would reverse the judgment.

MR. JUSTICE FRANKFURTER and MR. JUSTICE MURPHY join in this opinion.

EISLER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 255. Argued March 28, 1949.—Decided June 27, 1949.

In view of petitioner's flight from the country after the grant of his petition for writ of certiorari and after the submission of the cause on the merits, which may have rendered moot any judgment on the merits, the cause will be removed from the docket and, after this Term, will be left off the docket until a direction to the contrary shall issue. P. 190.

Petitioner was convicted in the United States District Court for the District of Columbia for a violation of R. S. § 102, as amended, 2 U. S. C. § 192. The United States Court of Appeals for the District of Columbia Circuit affirmed the conviction. 83 U. S. App. D. C. 315, 170 F. 2d 273. This Court granted certiorari. 335 U. S. 857. The cause is removed from the docket until further order of the Court, p. 190.

David Rein and *Abraham J. Isserman* argued the cause for petitioner. With them on the brief were *Carol King* and *Joseph Forer.*

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Campbell, Robert L. Stern, Robert S. Erdahl* and *Harold D. Cohen. Attorney General Clark* was also with *Mr. Perlman* on a memorandum.

Briefs of *amici curiae* supporting petitioner were filed by *Arthur Garfield Hays* and *Osmond K. Fraenkel* for the American Civil Liberties Union; *Lee Epstein* for the American Committee for Protection of Foreign Born; *Robert W. Kenny, Bartley C. Crum* and *Martin Popper* for Herbert Biberman et al.; *Robert J. Silberstein* and

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Arthur G. Silverman for the National Lawyers Guild; and *O. John Rogge* and *Benedict Wolf* for Edward K. Barsky et al.

PER CURIAM.

Petitioner's flight from the country after the grant of his petition for writ of certiorari and after the submission of his cause on the merits necessitates a decision as to the disposition now to be made of this case. Since the petitioner by his own volition may have rendered moot any judgment on the merits, we must, as a matter of our own practice, decide whether the submission should be set aside and the writ of certiorari dismissed or whether we should postpone review indefinitely by ordering the case removed from the docket, pending the return of the fugitive.

Our practice, however, has been to order such cases to be removed from the docket. *Smith* v. *United States,* 94 U. S. 97; *Bonahan* v. *Nebraska,* 125 U. S. 692. We adhere to those precedents. Accordingly after this term the cause will be left off the docket until a direction to the contrary shall issue.

While MR. JUSTICE BURTON has not participated in the consideration of the merits of this case, he has participated in this procedural action based upon the memorandum filed by the United States of America calling the attention of the Court to the petitioner's flight from justice.

MR. JUSTICE FRANKFURTER, with whom THE CHIEF JUSTICE joins, dissenting.

The Government has brought to the Court's attention the circumstances which, in its view, have deprived the Court of jurisdiction to adjudicate this case. Accordingly the Government, by way of suggestion, has moved the Court for its dismissal. The motion should be granted for the following reasons:

1. Eisler was convicted for contempt of Congress by the United States District Court for the District of Columbia and invoked the jurisdiction of this Court by a petition for certiorari filed August 31, 1948, seeking the determination of questions some of which at least we regarded as important enough to warrant review. We accordingly granted his petition. 335 U. S. 857. The case was argued March 28, 1949, and awaited only final disposition when, on May 6, 1949, the petitioner fled the United States. On May 13, the Attorney General requested the Secretary of State to make application through the usual diplomatic channels for the return of Eisler to the United States. That application was made, it was resisted by Eisler, and on May 27 the English court with final authority in such matters dismissed it on the ground that the crime for which Eisler's extradition was sought—the making of false statements in an application for an exit permit—was not extraditable. Since then Eisler has formally repudiated the jurisdiction of this country and has been elected to political office in a foreign country. The Attorney General has abandoned all attempts to secure his return. The upshot is that the abstract questions brought before the Court by Eisler are no longer attached to any litigant. No matter remains before us as to which we could issue process.

2. Very early after the Republic was founded it was confronted by an emergency in which its very existence was threatened. Serious questions touching the legal power of the President to deal with the crisis arose, and Washington sought answers to these legal questions from this Court. Even under circumstances so compelling, the first Chief Justice and his Associates had to deny President Washington's request for aid because the Constitution gave this Court no power to give answers to legal questions as such but merely the authority to decide them when a litigant was before the Court. See 3 Johnston, Correspondence and Public Papers of John Jay 486

(1891); 10 Sparks, Writings of George Washington 542 (1840). That recognition of the limited power of this Court has been unquestioned ever since 1793. It has been the principle by which cases formally before the Court have again and again been dismissed as beyond its jurisdiction. The circumstances which have called forth application of the principle have varied greatly, but all the instances of its application illustrate and confirm the basic limitation under which this Court functions, namely, that it can entertain a case and decide it only if there is a litigant before it against whom the Court may enforce its decision.

3. If legal questions brought by a litigant are to remain here, the litigant must stay with them. When he withdraws himself from the power of the Court to enforce its judgment, he also withdraws the questions which he had submitted to the Court's adjudication. The questions brought by Eisler have evaporated so far as the Court's power to deal with them is concerned because the rights and obligations of a litigant no longer depend on their answer. The Court therefore lacks jurisdiction as it lacked jurisdiction to answer Washington's questions. Not to dismiss the case for want of jurisdiction can only mean that the Court has jurisdiction and therefore must retain the case. And this, in turn, can only mean that the Court's eventual action must await the pleasure of Eisler and of every future litigant who, having invoked the Court's jurisdiction, withdraws himself beyond the means of asserting it. Eisler's political affiliation, of course, does not distinguish him from other litigants. It was irrelevant when the Court took his case at a time that it had jurisdiction over him; it is equally irrelevant to recognition of the fact that Eisler has put himself definitively beyond the Court's process were it to decide against him. Since the Court is without power effectively to decide against him, it is without power to decide at all. In

short, the Court no longer has jurisdiction, and it would be equally without jurisdiction if Eisler were the Bourbon pretender.

4. This case has nothing in common with instances cited as precedent for leaving it off the docket until a direction to the contrary shall issue. *Smith* v. *United States,* 94 U. S. 97; *Bonahan* v. *Nebraska,* 125 U. S. 692. In those cases convicts had broken jail while their cases were pending in this Court and remained at large. As a matter of practical good sense, apparently upon informal suggestion, the Court suspended disposition of the cases until it should receive word from the sheriff who reported the escape that a recapture had been accomplished. Such jailbreaks, indeed, as often as not imply a merely temporary separation from confinement. But whatever may be thought of such a light-reined way of dealing with a jailbreak from our local jails, the situation presented by this case is totally different. Here we have the most formal kind of resistance to the jurisdiction of this Court. It has been adjudicated successful, and the Attorney General has had to yield. Since the Court's power to reassert jurisdiction has been incontestably denied, the motion should be granted.

MR. JUSTICE MURPHY, dissenting.

The petitioner is an alien, a Communist, and a fugitive from justice. He was convicted of willful default before a Committee of Congress. We decided to hear this case after determining that the issues he presented were of importance. We heard argument, read briefs, and all but made the announcement of our decision.

Then the petitioner left the country. Efforts at extradition in Great Britain were unsuccessful. The petitioner is now beyond the territorial jurisdiction of this Court. It is argued that we are therefore without jurisdiction in the case.

We can decide only cases or controversies. A moot case is not a "case" within the meaning of Art. III. *United States* v. *Evans*, 213 U. S. 297. But a moot case is one in which the particular controversy confronting the Court has ended. That is not true when a prisoner has simply escaped. We are not at liberty to assume that all escaped defendants will never return to the jurisdiction. And the importance of a criminal judgment is not limited to the imprisonment of the defendant. Thus an alien convicted of crime is excluded from admission to the United States, 8 U. S. C. § 136 (e).

Since the question is one of jurisdiction, the unlikelihood of prejudice to this petitioner is irrelevant. Equally irrelevant on the question of mootness is President Washington's request for an advisory opinion. That the case may become moot if a defendant does not return does not distinguish it from any other case we decide. For subsequent events may render any decision nugatory. The petitioner having subjected himself to our jurisdiction by filing a petition for review, he cannot now revoke or nullify it and thus prevent an adjudication of the questions at issue merely by leaving the country and repudiating its authority. Thus I entirely agree with those of my brethren who believe we have jurisdiction.

But the Court adopts another alternative. It exercises its discretion and refuses to decide the issue. It is clear, however, as MR. JUSTICE JACKSON points out, that it is the importance of the legal issues, not the parties, which bring the case to this Court. Those issues did not leave when Eisler did. They remain here for decision; they are of the utmost importance to the profession and to the public.

Law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile. We should be loath to shirk our obligations, whatever the creed of the particular petitioner. Our

country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties.

I dissent.

MR. JUSTICE JACKSON, dissenting.

I cannot agree that a decision of Eisler's case should be indefinitely deferred, awaiting what I do not know. The case is fully submitted and all that remains is for members of the Court to hand down their opinions and the decision. Eisler's presence for that would be neither necessary nor usual. The case has reached this stage at considerable detriment to the country, since this Court's grant of his petition for review was what delayed Eisler's commencement of sentence and afforded him opportunity to escape. If ever there were good reasons to grant him a review, they are equally good reasons for now deciding its issues.

The Rules of this Court provide that we shall grant a petition for review here only where there are "*special and important reasons* therefor." They limit such cases to those that present "a question of *general importance* . . . which *has not been, but should be, settled by this court.*" Rule 38. (Emphasis supplied.)

Under our practice, the grant of Eisler's petition meant that four Justices of this Court, at least, were in agreement that the questions he raised were of this description. If they were then, they are still. His petition challenged the power of Congress and its investigating committees to hold, and to control the procedures of, investigations of this nature. These questions are recurring ones, certain to be repeated, for the grant of a review has cast doubt not only on the validity of Eisler's conviction but upon congressional procedures as well.

No one can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here.

Decision at this time is not urged as a favor to Eisler. If only his interests were involved, they might well be forfeited by his flight. But it is due to Congress and to future witnesses before its committees that we hand down a final decision. I therefore dissent from an expedient that lends added credence to Eisler's petition, which I think is without legal merit. I do not think we can run away from the case just because Eisler has.

I should not want to be understood as approving the use that the Committee on Un-American Activities has frequently made of its power. But I think it would be an unwarranted act of judicial usurpation to strip Congress of its investigatory power, or to assume for the courts the function of supervising congressional committees. I should affirm the judgment below and leave the responsibility for the behavior of its committees squarely on the shoulders of Congress.[1]

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[1] What the Congress can with safety do, after this Court's decision in *Christoffel* v. *United States*, *ante*, p. 84, seems to present a good question.

HIROTA *v.* MacARTHUR, GENERAL OF THE ARMY, ET AL.

NO. 239, MISC. MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.*

Argued December 16–17, 1948.—Decided December 20, 1948.—Concurring opinion announced June 27, 1949.

1. The military tribunal set up in Japan by General MacArthur as the agent of the Allied Powers is not a tribunal of the United States and the courts of the United States have no power or authority to review, affirm, set aside, or annul the judgments and sentences imposed by it on these petitioners, all of whom are residents and citizens of Japan. P. 198.
2. For this reason, their motions for leave to file petitions for writs of habeas corpus are denied. P. 198.

William Logan, Jr., George Yamaoka and, by special leave of Court, *George A. Furness, pro hac vice,* argued the cause for petitioners.

David F. Smith argued the cause for petitioners in Nos. 239 and 240, Misc., and filed a brief for petitioner in No. 239, Misc. *Mr. Yamaoka* was also of counsel for petitioner in No. 239, Misc. *Mr. Logan* and *John G. Brannon* were also of counsel for petitioners in Nos. 239 and 240, Misc.

John G. Brannon argued the cause for petitioners in No. 248, Misc. With him on the brief were *John W. Crandall, Mr. Logan, Mr. Yamaoka* and *Mr. Furness. Ben Bruce Blakeney* was also of counsel.

Solicitor General Perlman argued the cause for respondents. With him on the brief were *Judge Advocate Gen-*

*Together with No. 240, Misc., *Dohihara* v. *MacArthur, General of the Army, et al.* and No. 248, Misc., *Kido et al.* v. *MacArthur, General of the Army, et al.,* also on motions for leave to file petitions for writs of habeas corpus.

eral of the Army Thomas H. Green, Arnold Raum, Robert W. Ginnane, Oscar H. Davis, Beatrice Rosenberg and *Joseph B. Keenan.*

Samuel H. Jaffee filed a brief for the National Lawyers Guild, as *amicus curiae,* opposing the petitions.

PER CURIAM.

The petitioners, all residents and citizens of Japan, are being held in custody pursuant to the judgment of a military tribunal in Japan. Two of the petitioners have been sentenced to death, the others to terms of imprisonment. They filed motions in this Court for leave to file petitions for *habeas corpus.* We set all the motions for hearing on the question of our power to grant the relief prayed and that issue has now been fully presented and argued.

We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.

Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied.

MR. JUSTICE MURPHY dissents.

MR. JUSTICE RUTLEDGE reserves decision and the announcement of his vote until a later time.*

*MR. JUSTICE RUTLEDGE died September 10, 1949, without having announced his vote on this case.

MR. JUSTICE JACKSON took no part in the final decision on these motions.

MR. JUSTICE DOUGLAS, concurring.*

These cases present new, important and difficult problems.

Petitioners are citizens of Japan. They were all high officials of the Japanese Government or officers of the Japanese Army during World War II. They are held in custody pursuant to a judgment of the International Military Tribunal for the Far East. They were found guilty by that tribunal of various so-called war crimes against humanity.

Petitioners at the time of argument of these cases were confined in Tokyo, Japan, under the custody of respondent Walker, Commanding General of the United States Eighth Army, who held them pursuant to the orders of respondent MacArthur, Supreme Commander for the Allied Powers. Other respondents are the Chief of Staff of the United States Army, the Secretary of the Department of the Army, and the Secretary of Defense.

First. There is an important question of jurisdiction that lies at the threshold of these cases. Respondents contend that the Court is without power to issue a writ of *habeas corpus* in these cases. It is argued that the Court has no original jurisdiction as defined in Art. III, § 2, Cl. 2 of the Constitution,[1] since these are not cases

*These motions were argued December 16 and 17, 1948 and the opinion of the Court handed down December 20, 1948. I was not able within that short time to reduce my views to writing. Hence I concurred in the result "for reasons to be stated in an opinion."

[REPORTER'S NOTE: This opinion was announced on June 27, 1949.]

[1] Article III, § 2, Cl. 2 reads as follows:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before

affecting an ambassador, public minister, or consul; nor is a State a party. And it is urged that appellate jurisdiction is absent (1) because military commissions do not exercise judicial power within the meaning of Art. III, § 2 of the Constitution and hence are not agencies whose judgments are subject to review by the Court; and (2) no court of the United States to which the potential appellate jurisdiction of this Court extends has jurisdiction over this cause.

It is to the latter contention alone that consideration need be given. I think it is plain that a District Court of the United States does have jurisdiction to entertain petitions for *habeas corpus* to examine into the cause of the restraint of liberty of the petitioners.

The question now presented was expressly reserved in *Ahrens* v. *Clark*, 335 U. S. 188, 192, note 4. In that case aliens detained at Ellis Island sought to challenge by *habeas corpus* the legality of their detention in the District Court for the District of Columbia. It was argued that that court had jurisdiction because the Attorney General, who was responsible for their custody, was present there. We rejected that view, holding that it was the District Court where petitioners were confined that had jurisdiction to issue the writ. It is now argued that no District Court can act in these cases because if in one case their jurisdiction under the *habeas corpus* statute [2] is limited to inquiries into the causes of restraints

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mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

[2] 28 U. S. C. § 2241 (a) provides:

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

of liberty of those confined within the territorial jurisdictions of those courts, it is so limited in any other.

That result, however, does not follow. In *Ahrens* v. *Clark, supra,* we were dealing with the distribution of judicial power among the several District Courts. There was an explicit legislative history, indicating disapproval of a practice of moving prisoners from one district to another in order to grant them the hearings to which they are entitled. We held that the court at the place of confinement was the court to which application must be made. But it does not follow that, where that place is not within the territorial jurisdiction of any District Court, judicial power to issue the writ is rendered impotent.

Habeas corpus is an historic writ and one of the basic safeguards of personal liberty. See *Bowen* v. *Johnston,* 306 U. S. 19, 26. There is no room for niggardly restrictions when questions relating to its availability are raised. The statutes governing its use must be generously construed if the great office of the writ is not to be impaired. In *Ahrens* v. *Clark, supra,* denial of a remedy in one District Court was not a denial of a remedy in all of them. There was a District Court to which those petitioners could resort. But in these cases there is none if the jurisdiction of the District Court is in all respects restricted to cases of prisoners who are confined within their geographical boundaries.

Such a holding would have grave and alarming consequences. Today Japanese war lords appeal to the Court for application of American standards of justice. Tomorrow or next year an American citizen may stand condemned in Germany or Japan by a military court or commission.[3] If no United States court can inquire into

[3] Cases of this sort are beginning to appear. *In re Bush,* 336 U. S. 971, is such a case. Petitioner was a civilian employee of the War Department from Feb. 19, 1946 to Dec. 28, 1947, and

the lawfulness of his detention, the military have acquired, contrary to our traditions (see *Ex parte Quirin,* 317 U. S. 1; *In re Yamashita,* 327 U. S. 1), a new and alarming hold on us.

I cannot agree to such a grave and startling result. It has never been deemed essential that the prisoner in every case be within the territorial limits of the district where he seeks relief by way of *habeas corpus.* In *Ex parte Endo,* 323 U. S. 283, 304–306, a prisoner had been removed, pending an appeal, from the district where the petition had been filed. We held that the District Court might act if there was a respondent within reach of its process who had custody of the prisoner. The aim of the statute is the practical administration of justice. The allocation of jurisdiction among the District Courts, recognized in *Ahrens* v. *Clark,* is a problem of judicial administration, not a method of contracting the authority of the courts so as to delimit their power to issue the historic writ.

The place to try the issues of this case is in the district where there is a respondent who is responsible for the custody of petitioners. That district is obviously the District of Columbia. That result was reached by the Court of Appeals for the District of Columbia in *Eisentrager* v. *Forrestal,* 84 U. S. App. D. C. 396, 174 F. 2d 961.

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was stationed in Japan for most of that period. He terminated his employment and returned to this country. Thereafter, he was en route to Siam when his plane landed in Japan. He was arrested and tried by a General Provost Court sitting in Japan for trading American goods to a Japanese for certain emoluments. He was convicted and sentenced to one year imprisonment and fined 75,000 yen. On May 9, 1949, we denied his motion for leave to file a petition for *habeas corpus* "without prejudice to the right to apply to any appropriate court that may have jurisdiction."

For a somewhat comparable case from Germany see *Bird* v. *Johnson,* 336 U. S. 950, where we denied motions for leave to file petitions for writs of *habeas corpus* on April 18, 1949.

It held, in the case of a German national confined in Germany in the custody of the United States Army, that the court having jurisdiction over those who have directive power over the jailer outside the United States could issue the writ. In my view that is the correct result. For we would have to conclude that the United States Generals who have custody of petitioners are bigger than our government to hold that the respondent-officials of the War Department have no control or command over them. That result would raise grave constitutional questions, as *Eisentrager* v. *Forrestal, supra,* suggests.

It is therefore clear to me that the District Court of the District of Columbia is the court to hear these motions. The appropriate course would be to remit the parties to it, reserving any further questions until the cases come here by certiorari. But the Court is unwilling to take that course, apparently because it deems the cases so pressing and the issues so unsubstantial that the motions should be summarily disposed of.

Second. The Court in denying leave to file states:

> "We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.
>
> "Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners . . . ."

But that statement does not in my opinion adequately analyze the problem. The formula which it evolves to dispose of the cases is indeed potentially dangerous. It

leaves practically no room for judicial scrutiny of this new type of military tribunal which is evolving. It leaves the power of those tribunals absolute. Prisoners held under its mandates may have appeal to the conscience or mercy of an executive; but they apparently have no appeal to law.

The fact that the tribunal has been set up by the Allied Powers should not of itself preclude our inquiry. Our inquiry is directed not to the conduct of the Allied Powers but to the conduct of our own officials. Our writ would run not to an official of an Allied Power but to our own official. We would want to know not what authority our Allies had to do what they did but what authority our officials had.

If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.

I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well.

Let me illustrate the gravity and seriousness of the conclusion of the Court.

(1) Suppose an American citizen collaborated with petitioners in plotting a war against the United States. The laws of the United States provide severe penalties for such conduct. May that citizen be tried and convicted by an international tribunal and have no access to our courts to challenge the legality of the action of our representatives on it? May he, in the face of the safeguards which our Constitution provides even for traitors, have no protection against American action against him?

(2) Suppose an American citizen on a visit to Japan during the occupation commits murder, embezzlement, or the like. May he be tried by an international tribunal and have no recourse to our courts to challenge its jurisdiction over him?

(3) What about any other civilian so tried and convicted for such a crime committed during the occupation?

These are increasingly important questions as collaboration among nations at the international level continues. They pose questions for which there is no precedent. But we sacrifice principle when we stop our inquiry once we ascertain that the tribunal is international.

I cannot believe that we would adhere to that formula if these petitioners were American citizens. I cannot believe we would adhere to it if this tribunal or some other tribunal were trying American citizens for offenses committed either before or during the occupation. In those cases we would, I feel, look beyond the character of the tribunal to the persons being tried and the offenses with which they were charged. We would ascertain whether, so far as American participation is concerned, there was authority to try the defendants for the precise crimes with which they are charged. That is what we should do here.

(1) General Douglas MacArthur is the Supreme Commander for the Allied Powers. The Potsdam Declaration (July 26, 1945) provided for occupation of Japan

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by the Allies. The Instrument of Surrender (September 2, 1945) accepted the terms of the Potsdam Declaration. By the Moscow Agreement (December 27, 1945) the Supreme Commander was recognized as "the sole executive authority for the Allied Powers in Japan." It also established a Far Eastern Commission composed of representatives of eleven nations. It was vested with broad powers (a) to formulate policies, principles and standards by which Japan will fulfill its obligations under the Terms of Surrender and (b) to review directives issued to the Supreme Commander or any action taken by him involving policy decisions within its jurisdiction. All directives embodying policy decisions of the Commission are to be prepared by the United States and it transmits them to the Supreme Commander.[4] And the Commission is enjoined to respect "the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces."

The war crimes policy of the Allied Powers as respects Japan seems to have been first suggested in the Cairo Declaration [5] (December 1, 1943). The Potsdam Declaration promised that "stern justice" would be meted out "to all war criminals."

The Far Eastern Commission on April 3, 1946, adopted a policy decision which defined "war crimes" as including "Planning, preparation, initiation or waging of a war of

[4] The Moscow Agreement also provided:

"The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission."

[5] "The Three Great Allies are fighting this war to restrain and punish the aggression of Japan."

aggression or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." It provided that the Supreme Commander for the Allied Powers should have power to appoint special international military courts to try war criminals. Prior to this time the Supreme Commander had constituted a court for that purpose and had appointed judges from various nations to it. On receipt of the directive based on the Commission's war crimes policy decision he provided a new court—the one before which petitioners were tried. To this court the Supreme Commander appointed from names submitted by the respective nations eleven judges—one each from the United States, China, United Kingdom, Russia, Australia, Canada, France, The Netherlands, New Zealand, India, and the Philippines.

So I think there can be no serious doubt that, though the arrangement is in many respects amorphous and though the tribunal is dominated by American influence, it is nonetheless international in character. But it should be noted that the chain of command from the United States to the Supreme Commander is unbroken. It is he who has custody of petitioners. It is through that chain of command that the writ of *habeas corpus* can reach the Supreme Commander.

(2) The Constitution gives Congress the power to define and punish "Offences against the Law of Nations . . . ." Art. I, § 8, Cl. 10. It is argued that Congress here has not made aggressive war a crime nor provided individual punishment for waging it. It is therefore argued that these petitioners cannot be tried by United States officials for any such crime. We do not need to consider a case where the definition given by Congress conflicts with what a President does. There is no conflict here. The grant of power to the Congress does not necessarily preclude exercise of authority by the President. The Constitution

makes the President the "Commander in Chief of the Army and Navy of the United States . . . ." Art. II, § 2, Cl. 1. His power as such is vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country (*New Orleans* v. *Steamship Co.*, 20 Wall. 387, 394) and to punish those enemies who violated the law of war. *Ex parte Quirin, supra,* at 28–29; *In re Yamashita, supra,* at 10–11. We need not consider to what extent, if any, the President, in providing that justice be meted out to a defeated enemy, would have to follow (as he did in *Ex parte Quirin, supra,* and *In re Yamashita, supra*) the procedure that Congress had prescribed for such cases. Here the President did not utilize the conventional military tribunals provided for by the Articles of War. He did not act alone but only in conjunction with the Allied Powers. This tribunal was an international one arranged for through negotiation with the Allied Powers.

The President is the sole organ of the United States in the field of foreign relations. See *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318–321. Agreements which he has made with our Allies in furtherance of our war efforts have been legion. Whether they are wise or unwise, necessary or improvident, are political questions, not justiciable ones. That is particularly true of questions relating to the commencement and conduct of the war. Agreement with foreign nations for the punishment of war criminals, insofar as it involves aliens who are the officials of the enemy or members of its armed services, is a part of the prosecution of the war. It is a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done. It falls as clearly in the realm of political decisions as all other aspects of military alliances in furtherance of the common objective of victory. Cf. *Georgia* v. *Stanton,* 6 Wall. 50, 71.

After the escape of Napoleon from Elba where he had voluntarily retired, he was by agreement among the Powers entrusted to the custody of Great Britain. Then followed his banishment to St. Helena. I have no doubt that our President could have done the same as respects these petitioners. Or he could have made arrangements with other nations for their custody and detention. When the President moves to make arrangements with other nations for their trial, he acts in a political role on a military matter. His discretion cannot be reviewed by the judiciary.

The political nature of the decision which brought these petitioners before the International Military Tribunal is emphasized by the rulings which that tribunal made. The Charter of the Tribunal was constituted by an order of the Supreme Commander. It established the tribunal, determined its procedure, and described its jurisdiction. It described the "crimes" that came within the jurisdiction of the tribunal [6] and the standard of responsibility of the accused.[7]

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[6] Article 5 provided:

"The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"a. *Crimes against Peace:* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"b. *Conventional War Crimes:* Namely, violations of the laws or customs of war;

"c. *Crimes against Humanity:* Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators

Justice Pal of India, who dissented from the judgments of conviction, claimed that the Allied Powers as victors did not have the legal right under international law to treat petitioners as war criminals. He wrote at length, contending that the Pact of Paris,[8] 46 Stat. 2343, to which Japan was a signatory, did not affect the pre-

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and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

Petitioners Dohihara, Hirota, Kido, Oka, Sato, Shimada and Togo were found guilty of waging a war of aggression and of conspiring to do so. Petitioners Dohihara and Hirota were found guilty of conventional war crimes and crimes against humanity.

[7] Article 6 provided:

"Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

[8] This treaty provided in part:

"Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

. . . . .

"ARTICLE I

"The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

"ARTICLE II

"The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

See Miller, The Peace Pact of Paris (1928).

existing legal position of war in international life.[9] He rejected the argument that international customary law had developed under the Pact,[10] or that there was individual responsibility for the waging of aggressive war, even assuming it to be a crime under international law.[11]

He called on the Tribunal to rule on these questions. He stated:

> "We have been set up as an International Military Tribunal. The clear intention is that we are to be 'a judicial tribunal' and not 'a manifestation of power'. The intention is that we are to act as a court of law and act under international law. . We are to find out, by the application of the appropriate rules of inter-

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[9] For discussions *pro* and *con* on this issue see Glueck, War Criminals (1944); Glueck, The Nuremberg Trial and Aggressive War (1946).

[10] In this connection he said:

"I may mention here in passing that within four years of the conclusion of the Pact there occurred three instances of recourse to force on a large scale on the part of the signatories of the Pact. In 1929 Soviet Russia conducted hostilities against China in connection with the dispute concerning the Chinese Eastern Railway. The occupation of Manchuria by Japan in 1931 and 1932 followed. Then there was the invasion of the Colombian Province of Leticia by Peru in 1932. Thereafter, we had the invasion of Abyssinia by Italy in 1935 and of Finland by Russia in 1939. Of course there was also the invasion of China by Japan in 1937."

Some of the petitioners, notably Dohihara, Hirota, Kido and Togo, were found guilty on charges which involved waging of aggressive war prior to Pearl Harbor, *e. g.,* in connection with the Manchurian episode.

[11] He went so far as to say:

"In my view if the alleged acts do not constitute any crime under the existing international law, the trial and punishment of the authors thereof *with a new definition of crime* given by the victor would make it a 'war crime' on his part. The prisoners are to be dealt with according to the rules and regulations of international law and not according to what the victor chooses to name as international law."

national law, whether the acts constitute any crime under the already existing law, *dehors* the Declaration, the Agreement or, the Charter. Even if the Charter, the Agreement or the Declaration schedules them as crimes, it would only be the decision of the relevant authorities that they are crimes under the already existing law. But the Tribunal must come to its own decision. It was never intended to bind the Tribunal by the decision of these bodies, for otherwise the Tribunal will not be a 'judicial tribunal' but a mere tool for the manifestation of power.

"The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengence [*sic*] can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through *genuine legal process* alone may contribute substantially to the re-establishment of order and decency in international relations."

But the Tribunal, though expressing disagreement with Justice Pal on the point,[12] did not rule on the question.

[12] It stated in this connection that it was in complete accord with the following passages from the opinion of the Nuremberg Tribunal, Nazi Conspiracy and Aggression, Opinion and Judgment (1947), pp. 48, 50, 53, 49, 53–54:

"The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be

It ruled that "the law of the Charter is decisive and binding" upon it. It said:

> "This is a special tribunal set up by the Supreme Commander under authority conferred on him by the

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shown, it is the expression of international law existing at the time of its creation;

. . . . . .

"The question is, what was the legal effect of this pact? [Pact of Paris.] The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.

. . . . . .

"The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

. . . . . .

". . . the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

. . . . . .

"The Charter specifically provides in Article 8:

> " 'The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.'

"The provisions of this Article are in conformity with the law of all

Allied Powers. It derives its jurisdiction from the Charter. In this trial its members have no jurisdiction except such as is to be found in the Charter. The Order of the Supreme Commander, which appointed the members of the Tribunal, states: 'The responsibilities, powers, and duties of the members of the Tribunal are set forth in the Charter thereof . . .' In the result, the members of the Tribunal, being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as members, to try the accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter."

The President of the Tribunal, Sir William Flood Webb of Australia, in a separate opinion stated:

"The Charter is binding as it is International Law, the Potsdam Declaration and the Instrument of Surrender put into operation by the martial law of the Supreme Commander of the Allied Powers in occupation of Japan.

"The Supreme Commander stated in his proclamation of the Tribunal and Charter—the martial law referred to—that he acted in order to implement the term of surrender that stern justice should be meted out to war criminals.

. . . . .

"Under International Law belligerents have the right to punish during the war such war criminals as fall into their hands. The right accrues after occu-

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nations. . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

pation of the enemy territory. As a condition of the armistice a victorious belligerent may require the defeated state to hand over persons accused of war crimes. The Potsdam Declaration and the Instrument of Surrender contemplate the exercise of this right. But guilt must be ascertained before punishment is imposed; hence the provision for trials.

"The occupying belligerent may set up military courts to try persons accused of war crimes; and to assure a fair trial may provide among other things for civilian judges, the right of appeal, and publicity. (Oppenheim on *International Law,* 6th Edn. Vol. II, p. 456.)" [13]

The conclusion is therefore plain that the Tokyo Tribunal acted as an instrument of military power of the Executive Branch of government. It responded to the will of the Supreme Commander as expressed in the military order by which he constituted it. It took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law. As Justice Pal said, it did not therefore sit as a judicial tribunal. It was solely an instrument of political power. Insofar as American participation is concerned, there is no constitutional objection to that action. For the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.

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[13] He went on to state his view that the waging of aggressive war was a crime under international law and that individual responsibility attached thereto. Justice Jaranilla of the Philippines filed a separate concurring opinion to the same effect. Justice Bernard of France, though dissenting from the majority because of certain rulings on vicarious criminal responsibility and because he thought the trial was not fair, agreed that the waging of aggressive war was a crime.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1949.

UNITED STATES *v.* SPELAR, ADMINISTRATRIX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 42. Argued October 18, 1949.—Decided November 7, 1949.

The Federal Tort Claims Act, which is inapplicable by its terms to any claim "arising in a foreign country," does not authorize an action against the United States for an allegedly wrongful death occurring at a Newfoundland air base under long-term lease from Great Britain to the United States and allegedly resulting from the negligent operation of the air base by the United States. *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, distinguished. Pp. 218–222. 171 F. 2d 208, reversed.

The District Court dismissed an action brought against the United States under the Federal Tort Claims Act, to recover for the allegedly wrongful death of a flight engineer at an air field in Newfoundland leased by the United States from Great Britain. 75 F. Supp. 967. The Court of Appeals reversed. 171 F. 2d 208. This Court granted certiorari. 336 U. S. 950. *Reversed,* p. 222.

Samuel D. Slade argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Robert L. Stern* and *Cecelia H. Goetz.*

Arnold B. Elkind argued the cause for respondent. With him on the brief was *Gerald F. Finley.*

MR. JUSTICE REED delivered the opinion of the Court.

The Federal Tort Claims Act is inapplicable by its terms to "any claim arising in a foreign country." [1] The Court of Appeals for the Second Circuit has held that this provision does not bar suit against the Government for an allegedly wrongful death occurring at a Newfoundland air base under long-term lease to the United States.[2] We are here asked to review that decision.

Flight engineer Mark Spelar, an employee of American Overseas Airlines, was killed on October 3, 1946, in a take-off crash at Harmon Field, Newfoundland. This air base is one of the areas leased for ninety-nine years by Great Britain to the United States pursuant to the same executive agreement and leases discussed at length in *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377. Spelar's administratrix, respondent here, initiated this action against the United States under the Federal Tort Claims Act in the District Court of the United States for the Eastern District of New York, the district where she resides. She alleges that the fatal accident was caused by the Government's negligent operation of Harmon Field. The local law which underlies her cause of action is Newfoundland's wrongful death statute authorizing the executor or administrator to bring suit for death arising from negligence.[3] Upon the Government's motion, the District Court held the claim to be one "arising in a foreign

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[1] 62 Stat. 984, 28 U. S. C. (Supp. II) § 2680 (k). The language was identical at the time this suit was instituted though at that time contained in 60 Stat. 846, 28 U. S. C. § 943 (k).

[2] *Spelar* v. *United States,* 171 F. 2d 208.

[3] Cons. Stats. of Newfoundland (3d Series), c. 213. Local law must be pleaded since the Federal Tort Claims Act permits suit only "where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred." 60 Stat. 843, 28 U. S. C. § 931 (a). The substance of this provision is now embodied in 62 Stat. 933, 28 U. S. C. (Supp. II) § 1346 (b).

country," and dismissed the complaint for want of jurisdiction. The Court of Appeals reversed. Our decision in *Vermilya-Brown* that the Fair Labor Standards Act applies to such leased military bases was deemed "persuasive, if not well-nigh conclusive" of the issue here.[4] Because of this broad interpretation put upon our opinion in *Vermilya-Brown,* and because the decision substantially affects the area of private suit against the Government, we granted certiorari, 336 U. S. 950.

We are of the opinion that the court below has erred. Sufficient basis for our conclusion lies in the express words of the statute. We know of no more accurate phrase in common English usage than "foreign country" to denote territory subject to the sovereignty of another nation.[5] By the exclusion of claims "arising in a foreign country," the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States. We repeat what was said in *Vermilya-Brown* at page 380: "The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States." Harmon Field, where this claim "arose," remained subject to the sovereignty of Great Britain and lay within a "foreign country." The claim must be barred.

If the words of the statute were not enough, however, to sustain our result, we think the legislative history behind this provision concludes all doubt. The Federal Tort Claims Act of 1946 was the product of some twenty-eight years of congressional drafting and redrafting,

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[4] *Spelar* v. *United States,* 171 F. 2d 208, 209.

[5] See Mr. Justice Brown for the Court in *De Lima* v. *Bidwell,* 182 U. S. 1, 180: "A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States. *The Boat Eliza,* 2 Gall. 4; *Taber* v. *United States,* 1 Story, 1; *The Ship Adventure,* 1 Brock. 235, 241."

amendment and counter-amendment.[6] The draft being considered in 1942 by the House Committee on the Judiciary exempted all claims "arising in a foreign country in behalf of an alien." [7] At the suggestion of the Attorney General, the last five words were excised in a revised version of the bill,[8] so that the exemption provision assumed the form which was ultimately enacted into law.[9] The superseded draft had made the waiver of the Government's traditional immunity turn upon the fortuitous circumstance of the injured party's citizenship. The

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[6] Agitation for reform of the cumbersome private bill procedure bore its first fruit in H. R. 14737 introduced in the third Session of the Sixty-fifth Congress in 1919. The subject was almost continuously before one House or the other until the final passage of the substance of the present Act by the Seventy-ninth Congress. In the revision of the Judicial Code, Act of June 25, 1948, 62 Stat. 869, minor amendments, not relevant here, were made.

[7] H. R. 5373, 77th Cong., 2d Sess., § 303 (12).

[8] Hearings, H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 29, 35, 66. The Attorney General's revised version was H. R. 6463, § 402 (12).

[9] The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress. Subsequently the bill was reintroduced without substantial modification or further hearings until its enactment during the 79th Congress. The revised version of the tort claims bill introduced during the 2d session of the 77th Congress, S. 2221, was reported favorably by the Senate Committee on the Judiciary (S. Rep. No. 1196, 77th Cong., 2d Sess.), and passed the Senate. 88 Cong. Rec. 3174. The House Committee on the Judiciary, to which it was then referred, and which had been holding hearings on H. R. 6463, the companion measure to S. 2221, the bill passed by the Senate, reported the bill favorably (H. R. Rep. No. 2245, 77th Cong., 2d Sess.), but it was never considered by the House. It was reintroduced in the 78th Congress (H. R. 1356, 78th Cong., 1st Sess.; S. 1114, 78th Cong., 1st Sess.), but no action was taken and again in the 79th Congress (H. R. 181, reported in H. R. Rep. No. 1287, 79th Cong., 1st Sess.). It was finally passed by the 79th Congress as part of the omnibus Legislative Reorganization Act. 60 Stat. 842.

amended version identified the coverage of the Act with the scope of United States sovereignty. The record of the Hearings tells us why. We quote the pertinent colloquy between Assistant Attorney General Francis M. Shea, who explained the Attorney General's revised version of the bill to the House Committee on the Judiciary, and Congressman Robsion of that committee.

> "MR. SHEA. . . . Claims arising in a foreign country have been exempted from this bill, H. R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.
>
> "MR. ROBSION. You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?
>
> "MR. SHEA. That is right. That would have to come to the Committee on Claims in the Congress." [10]

In brief, though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. The legislative will must be respected. The present suit, premised entirely upon Newfoundland's law, may not be asserted against the United States in contravention of that will.

To the extent that *Vermilya-Brown Co.* v. *Connell* has any application to the case at bar, it stands as authority for our result here, for it postulates that the executive agreement and leases effected no transfer of sovereignty

[10] Hearings, *supra* note 8, p. 35.

with respect to the military bases concerned.[11] For the rest, we there held no more than that the word "possessions" does not necessarily imply sovereignty, and concluded as a matter of interpretation of the legislative history of the Fair Labor Standards Act that the leased bases, not in existence at the time the Act was passed, were to be included as "possessions" in the sense in which that word was used in that statute. The statutory language and the legislative record relating to the ambit of the Federal Tort Claims Act differ entirely from those pertinent to the Fair Labor Standards Act; and since the bases had been leased to the United States prior to the enactment of the statute here involved, the *Vermilya-Brown* problem of determining what Congress would have done when faced with a new situation does not exist at all in the present case.

In *Foley Bros.* v. *Filardo*,[12] we had occasion to refer to the "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . ." That presumption, far from being overcome here, is doubly fortified by the language of this statute and the legislative purpose underlying it.

The decision must be

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

In some aspects, no doubt, every statute presents a unique problem for interpretation. But the presuppositions of the judicial process in construing legislation

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[11] *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380.

[12] 336 U. S. 281, 285. The case holds the Eight Hour Law inapplicable to Government contractors working on military bases not under lease to the United States.

should be neither capricious nor *ad hoc.* While normally, therefore, it is not very fruitful to express disagreement either with the rendering of a particular statute or the mode by which that is reached, where this involves implications touching the very process of judicial construction silence may carry significance beyond the immediate case.

I agree that the Federal Tort Claims Act does not afford a right of action for the negligent conduct of the Government, through its employees, at one of the bases held by the United States under the long-term arrangements made with Great Britain. But the road traveled by the Court's opinion in reaching this result does not seem to me the way to get there.

The Court's opinion finds the phrase "foreign country," in that Act's restriction against claims "arising in a foreign country," to be as compelling in excluding the Newfoundland air base, under the kind of control that the United States exercises at these bases, as less than a year ago it found the term "possessions" in the Fair Labor Standards Act to be compelling in including these bases. *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377. To assume that terms like "foreign country" and "possessions" are self-defining, not at all involving a choice of judicial judgment, is mechanical jurisprudence at its best. These terms do not have fixed and inclusive meanings, as is true of mathematical and other scientific terms. Both "possessions" and "foreign country" have penumbral meanings, which is not true, for instance, of the verbal designations for weights and measures. It is this precision of content which differentiates scientific from most political, legislative and legal language.

A "foreign country" in which the United States has no territorial control does not bear the same relation to the United States as a "foreign country" in which the United States does have the territorial control that it has in the air base in Newfoundland. In the entangling relation-

ships between such nations as Great Britain and this country, it is not compelling that "foreign country" means today what it may have meant in the days of Chief Justice Marshall, or even in those of Mr. Justice Brown. The very concept of "sovereignty" is in a state of more or less solution these days. To find a single and undeviating content for "foreign country" necessarily excluding these bases, while "possessions" of the United States is to be deemed as necessarily including them, despite the momentum of historic meaning and experience leading to a contrary significance of "possessions," is to give the appearance of logically compulsive force to decisions. It fails to recognize the scope of supple words that are the raw materials of legislation and adjudication and is unmindful of those considerations of policy which underlie, consciously or unconsciously, seemingly variant decisions. When so many able judges can so misconceive the implications of our decision in *Vermilya-Brown Co.* v. *Connell, supra,* as they have been found to misconceive them, the source of difficulty cannot be wholly with these able lower court judges.

The considerations that led me to join in the dissent in *Vermilya-Brown Co.* v. *Connell, supra,* lead me to concur with the Court's construction of the Tort Claims Act in this case.

MR. JUSTICE JACKSON, concurring.

I reach the same result; but I could hardly do so, as does the Court, by reiteration of the prevailing opinion in *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377. That decision, taken with the present one, adds up to this: If an employee should chance to work overtime on a leased air base, he can maintain an action for extra wages, penalties and interest, because the Court finds the air base to be a "possession" of the United States. However, if he is injured at the same place, he may not proceed under

the Tort Claims Act to recover, because the Court finds the air base then to be a "foreign country." To those uninitiated in modern methods of statutory construction it may seem a somewhat esoteric doctrine that the same place at the same time may legally be both a possession of the United States and a foreign country. This disparity results from holding that Congress, when it refers to our leased air bases, at one time calls them "possessions" and at another "foreign countries." While congressional incoherence of thought or of speech is not unconstitutional and Congress can use a contrariety of terms to describe the same thing, we should pay Congress the respect of not assuming lightly that it indulges in inconsistencies of speech which make the English language almost meaningless. There is some reason to think the inconsistency lies in the Court's rendering of the statutes rather than in the way Congress has written them. At all events, the present decision seems to me correct, and, so far as it is contradicted by the effect of *Vermilya-Brown*, I think we should retreat from the latter.

ROTH, ATTORNEY GENERAL OF MICHIGAN, *v.* DELANO, COMPTROLLER OF THE CURRENCY, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 24. Argued October 14, 1949.—Decided November 7, 1949.

The Attorney General of Michigan brought an action in a federal district court in Michigan against the Comptroller of the Currency and the Receiver of an insolvent national bank located in Michigan for a declaratory judgment that the Michigan discovery and escheat statute, as amended in 1941, applies to unclaimed dividends on claims duly proved in liquidation. The Court of Appeals affirmed the District Court's dismissal of the action "on the merits"; but it was not clear whether it did so upon the ground that the Michigan statute was unconstitutional or upon the ground that it was not intended to apply to receiverships begun before its enactment. Moreover, the 1941 amendment has been repealed, with the possible consequence that no new suit could be maintained to enforce it. *Held:* Judgment vacated and the cause remanded for appropriate action in the light of this opinion. Pp. 227–231.

(a) Since an earlier decision of the court below holding the Michigan escheat law unconstitutional as applied to national banks, this Court has held, in effect, that the Constitution of the United States does not prohibit a state from escheating deposits in a national bank located and actively doing business therein, abandoned by their owners or belonging to missing persons. *Anderson National Bank* v. *Luckett*, 321 U. S. 233. Pp. 229–231.

(b) If the decision below rests upon earlier decisional law of the circuit holding that the Michigan escheat law was not intended to apply to receiverships begun before its enactment, this Court would hardly review such construction of the state act. P. 231.

(c) The 1941 amendment to the Michigan escheat act having been repealed since this action was brought, to now decide this suit for a declaratory judgment based thereon might be to render an advisory judgment on the constitutionality of a repealed state act, even though the repeal purported not to affect any "pending suit or proceeding." P. 231.

170 F. 2d 966, judgment vacated and cause remanded.

A federal district court dismissed a suit brought by the Attorney General of Michigan against the Comptroller of the Currency and the Receiver of an insolvent national bank for a declaratory judgment that the Michigan discovery and escheat statute (Mich. Comp. Laws, 1929, Mason's 1940 Cum. Supp., c. 263, as amended by Mich. Public Act No. 170 of 1941) applies to unclaimed dividends on claims duly proved in liquidation. The Court of Appeals affirmed. 170 F. 2d 966. On appeal to this Court, *judgment vacated and cause remanded,* p. 231.

Archie C. Fraser, Assistant Attorney General of Michigan, and *Julius H. Amberg* argued the cause for appellant. With them on the brief were *Stephen J. Roth,* Attorney General, and *Edmund E. Shepherd,* Solicitor General.

Stanley M. Silverberg argued the cause for the Comptroller of the Currency, appellee. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Morton Liftin* and *J. F. Anderson.*

Robert S. Marx for Connolly, Receiver, appellee.

Mr. Justice Jackson delivered the opinion of the Court.

The First National Bank—Detroit closed its doors in 1933 and, in its liquidation, dividends on proved claims, small in average but large in the aggregate, have remained for some years in the hands of the federal liquidators, unclaimed by their owners. Since this national banking institution was located in the State of Michigan, Attorneys General of that State have made persistent efforts at different stages of the liquidation to establish a right in the State to escheat the unclaimed dividends. Latest of these was this action, brought by the Attorney General

against the Comptroller of the Currency of the United States [1] and the Receiver of the First National Bank—Detroit, for a declaratory judgment that the Michigan discovery and escheat statute (Michigan Compiled Laws, 1929, Mason's 1940 Cum. Supp., c. 263), as amended by the statute known as Act 170, Public Acts of Michigan for 1941, applies to unclaimed dividends on claims duly proved in the liquidation. The Court of Appeals held the state statute ineffective as "an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions." It affirmed the District Court in dismissing the action "on the merits," adopting the "settled doctrine" of its own prior adjudications. 170 F. 2d 966. However, recourse to these opinions creates some doubt as to whether the Court of Appeals has held the Michigan statute to be invalid for conflict with the Constitution and laws of the United States or inapplicable by intendment of the Michigan Legislature. A review of these cited cases will expose the cause of our uncertainty.

In *Starr* v. *O'Connor,* 118 F. 2d 548 (1941), the then Circuit Court of Appeals reviewed the statutes of Michigan then in force, which did not include Act 170, here involved, and held them applicable to the First National liquidation but unconstitutional under our decision in *First National Bank of San Jose* v. *California,* 262 U. S. 366.

In *Rushton* v. *Schram,* 143 F. 2d 554 (1944), the court considered whether the amendment effected by Act 170 was applicable to the First National receivership at that stage of the liquidation. The court said that it must determine at the threshold whether this Act should be

[1] The trial court dismissed as to the Comptroller on the ground it had no jurisdiction over him and the Court of Appeals did not pass on the contention that he is a necessary party. 170 F. 2d 966, 967.

construed as retroactive in effect; that is, whether it applied to a liquidation commenced before its passage. This, of course, was a state law question and it was decided by reference to state decisions. The court construed the Act, in the light of Michigan decisional law, not to apply retroactively. It is true that the court there reviewed federal decisions to show that it would raise a serious question of constitutionality if the Act were construed otherwise. But *Anderson National Bank* v. *Luckett,* 321 U. S. 233, had intervened and in reference to it the Court of Appeals said, "In the light of that fresh authority, we do not say that if invoked for prospective application, and in a manner consistent with the federal statutes, the Michigan statute would conflict with the national banking laws and constitute an unlawful interference with the liquidation of a national bank. Discussion of that problem is deemed inappropriate in view of our conclusion that the Act under consideration carries no retroactive effect in the present situation." 143 F. 2d at 559.

In *Starr* v. *Schram,* 143 F. 2d 561 (1944), the Court of Appeals on the same day passed on the receiver's request for a declaration that the escheat laws were at no time validly applicable to the receivership and that he was entitled to recover back certain dormant deposit balances and the dividends thereon which already had been paid over to the State pursuant to the Act. The District Court had held that the state statute was invalid as an "unlawful interference" with the federal liquidation. This holding the Court of Appeals affirmed but, on considerations of state immunity from suit, it refused to allow recovery of what had been paid over.

Now comes *Black* v. *Delano*—the present case, Roth being substituted for Black—170 F. 2d 966 (1948), which the Court of Appeals rests on the "settled doctrine" of these cases.

Anderson National Bank v. *Luckett, supra,* in substance, held that the Constitution of the United States does not prohibit a State from escheating deposits in a national bank located and actively doing business therein, abandoned by their owners or belonging to missing persons. The State, after a reasonable lapse of time may lawfully administer such assets, holding them for the benefit of the disappeared claimant or the missing owner for a period and providing for eventual escheat. This it may do through appointment of a personal representative, or a public administrator, or by utilizing its own public officials. We held that mere putting of the State itself, or its duly named officer, in the shoes of the claimant to take what the bank would otherwise be obliged to disburse to the claimant himself does not burden, obstruct or frustrate a going bank in discharging its federal functions. We also held no interference with a bank's federal function to result from a mere requirement that it make a report to the State of unclaimed property, any more than from a requirement that it report to the State tangible property therein for the purposes of taxation, and nothing in our decisions suggests that such a disclosure would be an interference with the liquidation function. It would not seem too much to ask that a federal officer, possessed of property claimed by the State to be subject to its taxing or escheat power, make reasonable disclosure thereof to such authority as the State designates. It is but a decent comity between governments.

Of course, these basic and general rights of the State, including the enforcement of its claims, might be asserted at a time, in a manner or through such means as to interfere with the federal function of orderly liquidation or to conflict with federal law; but absent such interference with a federal statute, the basic assumption of the State here that nothing in the Constitution prevents it from escheating the specific claims here involved is made

clear in our recent decisions. *Anderson National Bank* v. *Luckett, supra.* See also *Connecticut Mutual Life Insurance Co.* v. *Moore,* 333 U. S. 541.

Reiteration of these general principles does not, of course, determine whether any peculiarity in the operation of Act 170 would go beyond the right of the State and constitute an unreasonable burden on federal functions of the receiver. But this question is not appropriate for decision here. If the judgment below rests, as well it may, upon earlier decisional law of the Circuit which held that this Act was not intended to apply to receiverships beginning before its enactment, we would hardly review such construction of the State Act. And there is a further reason why we should not now decide the principal question. Michigan has repealed Act No. 170 by Act 329, Public Acts of Michigan for 1947, reserving, however, from the effect of the repeal any "pending suit or proceeding." A possible consequence is that no new suit or proceeding could be maintained to enforce the repealed Act. Thus, to now decide this suit for a declaratory judgment might be to render an advisory opinion on the constitutionality of a repealed State Act. And, of course, a State cannot by reservation, any more than by affirmation, confer upon us the power or impose upon us the duty to render an advisory opinion.

In view of these considerations, we vacate and remand to the Court of Appeals for such action as it may consider appropriate in the light of the foregoing opinion.

Judgment vacated.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

GRAHAM ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 16. Argued October 10, 1949.—Decided November 7, 1949.

Petitioners, Negro locomotive firemen, brought suit in the District Court for the District of Columbia against an unincorporated labor organization which, under the Railway Labor Act, was the exclusive bargaining representative of the craft or class of railway employees to which they belonged. They sought injunctive and other relief against the enforcement of agreements between the labor organization and various railroads which, in matters of job assignments and promotions, discriminated against them because of their race. The District Court denied a motion to dismiss and granted a preliminary injunction. Holding that venue was improperly laid in the District of Columbia, the Court of Appeals reversed and ordered the case transferred to another district. *Held:*

1. The ruling of the District Court that the service of process on the labor organization was valid, which ruling was undisturbed and impliedly approved by the Court of Appeals, is accepted here. P. 235.

2. The venue statute applicable to the courts of the District of Columbia, D. C. Code § 11–308, which permits an action to be maintained if the defendant shall be "found" within the District, was available to the petitioners in this case and the general venue statute was not exclusive. Pp. 235–237.

(a) A party asserting a right under the Constitution or federal laws may invoke either the general venue statutes or the special District of Columbia statutes and the courts of the District may exercise their authority in cases committed to them by either. P. 237.

3. The District Court had jurisdiction to enforce by injunction petitioners' rights to nondiscriminatory representation by their statutory representative. Pp. 237–240.

(a) The jurisdiction of the District Court to grant relief by injunction in this case is not impaired by the Norris-LaGuardia Act. *Virginian R. Co.* v. *System Federation*, 300 U. S. 515. Pp. 237–238, 240.

(b) The Railway Labor Act imposes upon an exclusive bargaining representative the duty to represent all members of the craft without racial discrimination and federal courts at the suit of a racial minority of the craft will enforce that duty. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Firemen*, 323 U. S. 210. Pp. 238–240.

84 U. S. App. D. C. 67, 175 F. 2d 802, reversed.

Petitioners sued for injunctive and other relief against a labor organization and others. The District Court denied a motion to dismiss and granted a preliminary injunction. The labor organization alone appealed. The Court of Appeals reversed, holding venue improperly laid in the District of Columbia. 84 U. S. App. D. C. 67, 175 F. 2d 802. This Court granted certiorari. 337 U. S. 954. *Reversed and remanded,* p. 240.

Joseph L. Rauh, Jr. argued the cause for petitioners. With him on the brief were *Irving J. Levy* and *Henry Epstein. Charles Cook Howell* was of counsel for the Atlantic Coast Line Railroad Co., petitioner.

Milton Kramer argued the cause for respondent. With him on the brief were *Lester P. Schoene, Harold C. Heiss* and *Russell B. Day.*

Solicitor General Perlman and *Robert L. Stern* filed a brief for the United States, as *amicus curiae,* supporting petitioners.

James B. McDonough, Jr. and *Frank J. Wideman* filed a brief for the Seaboard Air Line Railroad Co., as *amicus curiae.*

Mr. Justice Jackson delivered the opinion of the Court.

Twenty-one Negro firemen, sometime employed by southern railroads, brought this suit against the principal defendant, the Brotherhood of Locomotive Firemen and

Enginemen, three railroads, two local lodges of the Brotherhood, and certain officers of those lodges. The complaint alleges in substance that the Brotherhood is an exclusively white man's union and, as it includes a majority of the craft, it is possessed of sole collective bargaining power in behalf of the entire craft including the Negro firemen in consequence of the Railway Labor Act. It has negotiated agreements and arrangements with the southern railroads which discriminate against colored firemen, who are denominated "not-promotable" while white ones are "promotable." The effect of the agreements is to deprive them, solely because of their race, of rights and job assignments to which their seniority would entitle them. Many Negro firemen have been thus displaced or demoted and replaced by white firemen having less seniority. The complaint asked for a declaration of petitioners' rights, for an injunction restraining compliance with the above agreements, and for damages. In short, the cause of action pleaded is substantially the same as that which this Court sustained in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210.

It is needless to recite additional details of the present case. What it adds to the governing facts of the earlier cases is a continuing and willful disregard of rights which this Court in unmistakable terms has said must be accorded to Negro firemen.

Upon the complaint, supplemented by evidence that the deliberate elimination of Negro firemen was proceeding at a rapid pace and that they would soon be entirely displaced, motion was made for a preliminary injunction to prevent further discrimination and loss of job assignments pending the outcome of the litigation.

The Brotherhood did not meet the allegations of the bill of complaint or the affidavits. It rested on a motion

to dismiss, assigning as grounds that it had not been properly served with process and that venue was unlawfully laid in the District of Columbia. The trial court, after hearing evidence of the parties on these matters, denied the motion to dismiss and granted a preliminary injunction.

The Brotherhood alone petitioned the Court of Appeals under District of Columbia Code, § 17–101, for a special appeal and stay of the injunction. These were granted and that court reversed. Holding that venue was improperly laid in the District of Columbia, it ordered the case transferred to the Northern District of Ohio. 84 U. S. App. D. C. 67, 175 F. 2d 802. We granted certiorari. 337 U. S. 954.

At the outset we are met by the contention in support of the judgment below that service of process upon the Brotherhood was not legally perfected, in which case, of course, it would not properly be before the Court at all. The District Court, after hearing evidence upon the subject, held that service upon the Brotherhood was sufficient. The Court of Appeals noted that this question was raised but did not reverse upon this ground. Instead, it considered at length whether the action constitutionally could be entertained by the courts of the District of Columbia, a subject which would hardly be ripe for decision if the action had not been properly commenced anywhere. Moreover, its decision transferred the cause to the Northern District of Ohio, a power which it could exert only if it considered the service adequate to confer jurisdiction of the parties. We accept the ruling of the District Court on the adequacy of service, based as it is essentially on matters of fact, and undisturbed and impliedly approved by the Court of Appeals. We hold that personal jurisdiction of the respondent is established.

This cause of action is founded on federal law, and the venue provision generally applicable to federal courts at

the time this action was commenced required such actions to be brought in the district whereof defendant "is an inhabitant." 28 U. S. C. § 112. Effective September 1, 1948, this provision was modified to require that such actions be brought "only in the judicial district where all defendants reside, except as otherwise provided by law." 28 U. S. C. (Supp. II) § 1391 (b). It was assumed in the courts below, and since it involves a question of fact we do not stop to inquire as to whether they were correct in so doing, that if this general federal venue statute is the sole authority for bringing this case in the District of Columbia, the venue could not be supported, as this defendant claims neither to reside in nor to inhabit the District.

But there is, additionally, a venue statute enacted by Congress, applicable to the courts of the District of Columbia, which permits an action to be maintained if the defendant shall be "an inhabitant of, *or found within,* the District." D. C. Code § 11–308. (Italics supplied.) See also § 11–306. The District Court concluded upon all the evidence that the Brotherhood was found within the District, and it based venue upon that finding. The Court of Appeals did not deny that the defendant was so "found" within the meaning of this Act, but held the Act itself unavailing to this plaintiff because it believed that the constitutional power of Congress under Art. I, § 8, Cl. 17, to provide for the government of the District of Columbia, does not enable Congress to vest jurisdiction of such cases as this in District of Columbia courts. It based this reasoning on *O'Donoghue* v. *United States,* 289 U. S. 516.

Little would be accomplished by reviewing the conflicting theories as to the origin and extent of congressional power over District of Columbia courts. It is enough to say that we do not read any prior decision of this Court to deny Congress power to invest these courts

with jurisdiction to hear and decide such a cause as we have here. We hold that a party asserting a right under the Constitution or federal laws may invoke either the general venue statutes or the special District of Columbia statutes and that the courts of this District may exercise their authority in cases committed to them by either.

The respondent has strenuously urged throughout that in view of the provisions of the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.*, the District Court was without jurisdiction to grant relief by injunction.

The Court of Appeals did not pass upon this contention, and were it a question of first impression we should not be disposed to consider it here at the present stage of the proceedings. But this is not a question of first impression. In *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, we held that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act, 45 U. S. C. §§ 151 *et seq.*, enacted for the benefit and protection, within a particular field, of the same groups whose rights are preserved by the Norris-LaGuardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to "turn the blade inward." We adhere to the views expressed in the *Virginian* case.

But the Brotherhood urges that the controversy in the *Virginian* case did not involve a labor dispute within the meaning of the Norris-LaGuardia Act and that accordingly that case must be distinguished on its facts. The Act defines a "labor dispute" to include "any controversy concerning terms or conditions of employment, or con-

cerning the *association or representation of persons* in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment . . . ." 29 U. S. C. § 113 (c). (Emphasis supplied.) We do not accept the Brotherhood's invitation to narrow the meaning of that term. The purpose of the Act would be vitiated and the scope of its protection limited were it to be construed as not extending to efforts of a duly certified bargaining agent to obtain recognition by an employer. Moreover, if this Court had considered that a labor dispute was not involved, it would hardly have taken the trouble, in the *Virginian* case, to refute contentions based upon parts of the Act, which as a whole extends its protection solely to such disputes.

The *Steele* and *Tunstall* cases, *supra,* arose under circumstances almost indistinguishable from those of the instant case, and the complaints asked the same kind of relief. We held there that, as the exclusive statutory representative of the entire craft under the Railway Labor Act, the Brotherhood could not bargain for the denial of equal employment and promotion opportunities to a part of the craft upon grounds of race. We pointed out that the statute which grants the majority exclusive representation for collective bargaining purposes strips minorities within the craft of all power of self-protection, for neither as groups nor as individuals can they enter into bargaining with the employers on their own behalf. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342; *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332; *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678. And we held that abuse of its powers by perpetrating discriminatory employment practices based on racial considerations gives rise to a cause of action under federal law which federal courts will entertain and will remedy by injunction. But although the Norris-LaGuardia Act relates to the jurisdiction of the federal courts to grant

injunctions in labor disputes, the issue was not pressed, and we did not discuss it at length.

However, the opinion left no doubt as to the Court's position: "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. . . . For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks* [281 U. S. 548], 556–557, 560, and in *Virginian R. Co.* v. *System Federation, supra,* 548, and like it is one for which there is no available administrative remedy." *Steele* v. *Louisville & Nashville R. Co., supra,* 207. And see *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, supra,* 213.

It would serve no purpose to review at length the reasons which, in the *Steele* and *Tunstall* cases, *supra,* impelled us to conclude that the Railway Labor Act imposes upon the Brotherhood the duty to represent all members of the craft without discrimination and invests a racial minority of the craft with the right to enforce that duty. It suffices to say that we reiterate that such is the law.

Nor does the Norris-LaGuardia Act contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation by which there would be taken from them

their seniority and ultimately their jobs. Conversely there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' right to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy. If, in spite of the *Virginian, Steele,* and *Tunstall* cases, *supra,* there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now. The District Court has jurisdiction to enforce by injunction petitioners' rights to nondiscriminatory representation by their statutory representative.

Accordingly, the judgment of the Court of Appeals is reversed, the order of the District Court is reinstated, and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion. Let the mandate go down forthwith.

Reversed and remanded.

MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consideration or decision of this case.

Syllabus.

McGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* MANUFACTURERS TRUST CO.

NO. 11. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued October 12, 1949.—Decided November 7, 1949.

1. In a summary proceeding under § 17 of the Trading with the Enemy Act to enforce an order of the Alien Property Custodian to turn over to him a fund belonging to an enemy alien, the Custodian is not entitled to recover interest (at 6% or any other rate) from the date of the turnover order, where such interest is not a part of, or an increment on, the fund owing to the enemy alien. Pp. 246–249.

   (a) Section 16 of the Act prescribes fines, sentences and forfeitures as sanctions for willful violations of vesting orders and turnover directives; and nowhere in the Act is there provision for the allowance of interest charges in connection with these summary proceedings. Pp. 247–248.

   (b) In such a proceeding, the Government is not in the position of a creditor collecting a debt owing to itself, and it is not entitled to interest as upon a contractual obligation or one arising out of customs duties or taxes. P. 248.

   (c) There is not involved here any issue regarding a claim for interest constituting a part of, or an increment on, the fund owing to the enemy alien. Pp. 248–249.

2. Questions which would have been presented if the answer in the summary proceeding under § 17 had contained a denial of the alleged debt, an unequivocal plea of setoff, or a claim of a lien upon the enemy creditor's interest in the debt or in its proceeds, need not here be considered, since the answer did not present those issues. Pp. 249–250.

169 F. 2d 932, affirmed in part.

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*Together with No. 15, *Manufacturers Trust Co.* v. *McGrath, Attorney General, as Successor to the Alien Property Custodian,* also on certiorari to the United States Court of Appeals for the Second Circuit.

In a summary proceeding under § 17 of the Trading with the Enemy Act, for enforcement of a turnover directive of the Alien Property Custodian, the District Court directed the bank to pay to the Custodian the sum of $25,581.49, plus interest at 6% from the date of the turnover directive. The Court of Appeals disallowed the interest but otherwise affirmed. 169 F. 2d 932. Petitions for certiorari by both parties were at first denied by this Court, 335 U. S. 910, but subsequently granted, 337 U. S. 953. *No. 11 affirmed; No. 15 vacated,* p. 251.

Joseph W. Bishop, Jr. argued the cause for the Attorney General. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bazelon* and *James L. Morrisson.*

Leonard G. Bisco argued the cause for the Manufacturers Trust Co. With him on the brief was *Henry Landau.*

Mr. Justice Burton delivered the opinion of the Court.

Numbers 11 and 15 are cross appeals from *Clark* v. *Manufacturers Trust Co.*, 169 F. 2d 932 (C. A. 2d Cir.).[1] Certiorari was granted in No. 11, on petition of the Custodian,[2] to resolve a conflict between the judgment below and that in *Clark* v. *Lavino & Co.*, 175 F. 2d 897 (C. A. 3d

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[1] J. Howard McGrath was substituted for Tom C. Clark, as Attorney General, 338 U. S. 807.

[2] The term "Custodian" is used to refer either to the Alien Property Custodian or to the Attorney General who succeeded to the powers and duties of the Alien Property Custodian under Executive Order No. 9788, effective October 15, 1946, 1 C. F. R. 1946 Supp. 169.

Cir.). The conflict is confined to the Custodian's claim to the allowance of interest, in his favor, in a summary proceeding under § 17 of the Trading with the Enemy Act.[3] He claims interest from the date that his Turnover Directive [4] was served upon the Manufacturers Trust Company, here referred to as the bank, and computes such interest upon the sum which he ordered turned over. For the reasons hereinafter stated, we agree with the judgment below in its denial of interest. We granted certiorari also on the cross appeal of the bank in No. 15. This was to enable us to reexamine the pleadings and, if they were found to permit it; to consider the bank's claim that the District Court lacked authority to order it to turn over to the Custodian the principal sum in question, in the face of the bank's denial of its indebtedness to the enemy creditor for that sum, its claim of a setoff in excess of the alleged debt, and its claim to a lien upon the proceeds of the debt. We find that the record does not permit us to reach that issue.

February 1, 1946, the Custodian issued his Vesting Order No. 5791, 11 Fed. Reg. 3005, under authority of

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[3] "SEC. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary.'" 40 Stat. 425, 50 U. S. C. App. § 17.

[4] Issued under § 7 (c), 40 Stat. 418, as amended, 40 Stat. 1020, 50 U. S. C. App. § 7 (c), and Executive Order No. 9193, 1 C. F. R. Cum. Supp. 1174, as amended by Executive Order No. 9567, 1 C. F. R. 1945 Supp. 77.

§ 5 (b) of the Trading with the Enemy Act,[5] vesting himself with the following described "property":

> "That certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same, ..."

January 30, 1947, the Custodian served on the bank his Turnover Directive based upon his Vesting Order and thereby directed that the sum of $25,581.49, "together with all accumulations to and increments thereon, shall forthwith be turned over to the undersigned [the Custodian] to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."

October 29, 1947, the Custodian filed in the United States District Court for the Southern District of New York his petition against the bank seeking summary enforcement of his order under § 17 of the Act, *supra*. November 13, 1947, the bank answered.[6]

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[5] § 5 (b), 40 Stat. 415, as amended, 55 Stat. 839, 50 U. S. C. App. § 5 (b), and Executive Order No. 9095, 1 C. F. R. Cum. Supp. 1121.

[6] The following parts of the answer are especially material to our decision in No. 15:

"7. Furthermore, by a vesting order the Alien Property Custodian can only vest property or a debt which was in existence at the time of the issuance of the Vesting Order. Manufacturers Trust Company did not hold any property for or on behalf of the Deutsche Reichsbank. The relationship between Manufacturers Trust Company as a depository and the Deutsche Reichsbank as a depositor of Manufacturers Trust Company is a debtor and creditor relationship. The existence of a debt from Manufacturers Trust Company to the Deutsche Reichsbank can not be predicated upon the status of a particular account. Manufacturers Trust Company can not be a debtor of the Deutsche Reichsbank unless the total of their mutual credits exceeds the total of their mutual debits. At the time of the

December 12, 1947, the District Court, without opinion, directed the bank to pay to the Custodian $25,581.49, *plus interest at 6% per annum from January 30, 1947.* The Court of Appeals for the Second Circuit struck out the interest but otherwise affirmed the judgment. One judge said he would have preferred to limit that court's holding to the point that the answer did not allege a sufficiently unequivocal claim to a setoff to raise that defense. Another dissented from the denial of interest. Petitions for certiorari were denied to both parties, January 17, 1949. 335 U. S. 910.

June 16, 1949, the Custodian asked leave to file a petition for rehearing and for a writ of certiorari on the ground that, on June 1, 1949, the Court of Appeals for the Third Circuit had decided *Clark* v. *Lavino & Co., supra,* in which it had expressly allowed interest to the Custodian under circumstances largely comparable to those in the case below. The bank asked leave to present its contentions

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issuance of the Vesting Order No. 5791, Deutsche Reichsbank's indebtedness to Manufacturers Trust Company was in excess of $25,581.49 and therefore there was no debt owing from Manufacturers Trust Company to Deutsche Reichsbank arising out of the Reichsbank Direktorium Divisen Ab[t]eilung account. *The indebtedness of the Deutsche Reichsbank arose from the fact that Deutsche Reichsbank was upon information and belief, an instrumentality and part of the German Government. The German Government guaranteed to Manufacturers Trust Company the payment of debts of various German Banks to Manufacturers Trust Company. On June 1st, 1940 and June 14th, 1941, the indebtedness of the said banks to Manufacturers Trust Company, was in excess of $25,581.49.*

"8. In addition to the foregoing, Manufacturers Trust Company is advised by counsel that a lien of a bank on a depositor's balance for the amount of depositor's indebtedness to the bank is well recognized by law. Manufacturers Trust Company is further advised by counsel that Section 8 of the Trading with the Enemy Act recognizes the lien of any person who is not an enemy or an ally of an enemy and the lienor's right to realize thereon in satisfaction of the lienor's claims." (Emphasis supplied.)

should the Custodian's petition for certiorari be granted. All applications were granted. 337 U. S. 953.

I.

The Trading with the Enemy Act is a war measure.[7] It creates powerful and swift executive and summary procedures particularly for the seizure of the property of enemies by legal process as an effective alternative to seizure by military force. The Act expressly provides for the seizure of enemy-held claims to money owed on debts. *Kohn* v. *Jacob & Josef Kohn, Inc.*, 264 F. 253 (S. D. N. Y.). Special proceedings are provided to try the merits of claims to property seized in such summary possessory procedures.[8] The present action is a summary

[7] "The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, . . . or as since amended, March 28, 1918, . . . November 4, 1918, . . . July 11, 1919, . . . June 5, 1920, . . . is strictly a war measure and finds its sanction in the constitutional provision, Art. I, § 8, cl. 11, empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' . . .

"It is with parts of the act which relate to captures on land that we now are concerned. . . . [After discussing particularly §§ 7 (c), 9, and 12]:

"That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. . . . There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final." *Stoehr* v. *Wallace*, 255 U. S. 239, 241–242, 245–246. See also, *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 568; Rubin, "Inviolability" of Enemy Private Property, 11 Law and Contemp. Prob. 166 (1945).

[8] Section 9 (a) of the Act, 42 Stat. 1511, 50 U. S. C. App. § 9 (a), provides for the administrative consideration and allowance of claims to property transferred to the Custodian. A claimant also may sue

possessory proceeding under § 17.[9] Section 16, which has accompanied § 17 in the Act since 1917, prescribes fines, sentences and forfeitures as special sanctions to punish willful violations of vesting orders or turnover directives as follows:

> "That whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, . . . concerned in such violation shall be forfeited to the United States." 40 Stat. 425, 50 U. S. C. App. § 16.[10]

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in a District Court for an adjudication of the validity of his claim. Section 32, 60 Stat. 50, as amended, 60 Stat. 930, 50 U. S. C. App. § 32, authorizes the administrative recognition of claims to property in the possession of the Custodian and § 34, 60 Stat. 925, 50 U. S. C. App. § 34, authorizes a procedure for the allowance, and payment to claimants, of debts owed by the person whose property has been seized by the Custodian. See also, *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 568; *Garvan* v. *$20,000 Bonds,* 265 F. 477 (C. A. 2d Cir.); *Simon* v. *Miller,* 298 F. 520, 524 (S. D. N. Y.); *Kahn* v. *Garvan,* 263 F. 909, 916 (S. D. N. Y.).

[9] Petition filed October 29, 1947. Order to show cause issued that day. Answer filed November 13. Case heard and decided that day. Judgment entered December 12.

[10] See also, penalties for willful violation added to § 5, 48 Stat. 1, 50 U. S. C. App. § 5 (b)(3). The Custodian may make the required Presidential determinations under § 7 (c). "In short, a personal determination by the President is not required; he may act through

The Act makes no mention of interest charges in connection with the enforcement of these summary procedures. We recognize that, in the absence of express statutory provision for it, interest sometimes has been allowed in favor of the Government under other statutes when the Government's position has been primarily that of a creditor collecting from a debtor.[11] See *Rodgers* v. *United States,* 332 U. S. 371, 373, in which the rule was stated and interest disallowed. In the present case, however, we are not dealing with interest accruing to the Government upon contractual indebtedness or upon indebtedness such as that arising out of customs duties or taxes. We have here quite a different matter, the violation of a summary order of the Alien Property Custodian to turn over to him the physical possession of certain funds as a protective war measure. The Turnover Directive in the instant case is, in its essence, the same kind of an order as would have been issued to compel the delivery to the Custodian of the physical possession of a $25,000 bond owned by the Deutsche Reichsbank but held by the Manufacturers Trust Company in the latter's safe-deposit vaults. Statutory fines, sentences and forfeitures are prescribed for willful violation of such an order and, in the case of the bond, it is obvious that there would be no basis for the addition of an interest charge, computed at a statutory or judicially determined rate on the face or estimated value of the bond and running merely from the date of the Turnover Directive. Similarly, we find no basis for adding such an interest charge in the instant case.

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the Custodian, and a determination by the latter is in effect the act of the President." *Stoehr* v. *Wallace,* 255 U. S. 239, 245; and see *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 567.

[11] *E. g., Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296; *Billings* v. *United States,* 232 U. S. 261; see also, *Board of Commissioners* v. *United States,* 308 U. S. 343, 350, 352.

No claim of the Custodian for any interest accruing under the terms of the agreement of deposit is before us. The Custodian, in his Turnover Directive and in his petition, called for the delivery to him of the $25,581.49 owing to Deutsche Reichsbank on the date of the Vesting Order, February 1, 1946, together with all accumulations and increments thereon since that date. He made no showing of a contractual basis for any additions to such principal sum and, accordingly, judgment was rendered for the delivery to him of precisely $25,581.49, and no claim is made here that such sum is not the correct total amount of the indebtedness. The District Court, however, also ordered the bank to turn over to the Custodian 6% interest on $25,581.49 from January 30, 1947. This additional item reflected no terms of the deposit agreement. Whatever those terms may have been, they had not changed since February 1, 1946, so that any possible basis for the 6% interest from January 30, 1947, must be sought in the Trading with the Enemy Act. We find no authority in that Act for a 6% rate or for any other rate of coercive interest to be added as an incident to a summary order for the transfer of possession of funds. Accordingly, in No. 11, we affirm the judgment of the Court of Appeals, which omitted the interest.

II.

In No. 15, the parties have discussed several questions which would have been presented if the answer had contained a denial of the alleged debt, an unequivocal plea of setoff, or a claim of a lien upon the Deutsche Reichsbank's interest in the debt or in its proceeds. The answer, however, did not present those issues and we do not consider them. When read as a whole, the answer did not deny the existence of the credit balance of $25,581.49 which the Custodian claimed was on deposit and which was the subject of the Custodian's Vesting Order. Nor

did it unequivocally assert a setoff. Instead, the answering bank alleged, on information and belief, that an offsetting indebtedness of the Deutsche Reichsbank to it arose from the fact that the Deutsche Reichsbank was an instrumentality and part of the German Government, that the German Government had guaranteed to the answering bank the payment to it of the debts of various German banks, and that, on the date of the Vesting Order, the indebtedness of said German banks to the answering bank was in excess of $25,581.49. Those allegations did not state that the Deutsche Reichsbank was *such* an instrumentality and *such* a part of the German Government as would make the Reichsbank automatically the guarantor of the debts of other German banks to the answering bank.[12] The answer did not even allege the status of the guaranteed debts to be such as to entitle the answering bank to resort to the alleged guaranty of their payment by the Deutsche Reichsbank.[13] The bank's claim to a lien upon the deposit depended, likewise, upon the inadequately alleged indebtedness of the Deutsche Reichsbank to it.

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[12] For a description of the contemporary monetary and banking system of Germany and of the part played in it by the Deutsche Reichsbank, see Military Government Handbook, Germany, Section 5: Money and Banking, Army Service Forces Manual M356–5 Revised (March 1945), pp. 4, 66–73. For examples of differences between the liabilities of foreign public or semipublic corporations and those of the foreign governments to which they are related, see *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S. D. N. Y.) and *Coale* v. *Société Co-op.*, 21 F. 2d 180 (S. D. N. Y.).

[13] 5 Michie, Banks and Banking (Perm. Ed.) §§ 126–128, and cases cited; 7 Zollmann, Banks and Banking (Perm. Ed.) §§ 4392, 4563, 4590. See also, restrictions on assertion, without a federal license, of any right of setoff which did not exist before June 14, 1941. Executive Order No. 8785, §§ 1. A. and 1. E., 1 C. F. R. Cum. Supp. 948, and see *Propper* v. *Clark*, 337 U. S. 472.

For the foregoing reasons the judgment in No. 11 is affirmed, and the judgment in No. 15 is vacated so as to permit such amendments of the pleadings or further proceedings as shall be consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of either of these cases.

TREICHLER, EXECUTOR, *v.* WISCONSIN.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 20. Argued October 11–12, 1949.—Decided November 7, 1949.

1. The Wisconsin emergency tax on inheritances, Wis. Stat. 1947, § 72.74 (2), as applied by the Supreme Court of Wisconsin in this case, is a tax on property rated and measured in part by tangible property situated in other states. Pp. 252–256.
2. Insofar as it is measured by tangible property outside Wisconsin, the tax violates the Due Process Clause of the Fourteenth Amendment. *Frick* v. *Pennsylvania,* 268 U. S. 473. Pp. 256–257.

254 Wis. 24, 35 N. W. 2d 404, reversed.

The Supreme Court of Wisconsin sustained a levy of certain taxes on the estate of appellant's testator under Wis. Stat. 1947, § 72.74 (2), notwithstanding a claim that it violated the Due Process Clause of the Fourteenth Amendment because it was based in part on tangible property located outside the State. 254 Wis. 24, 35 N. W. 2d 404. On appeal to this Court, *reversed,* p. 257.

Alexander W. Schutz argued the cause and filed a brief for appellant.

Harold H. Persons, Assistant Attorney General of Wisconsin, argued the cause for appellee. With him on the

brief were *Thomas E. Fairchild,* Attorney General, and *Neil Conway.*

J. Gilbert Hardgrove filed a brief, as *amicus curiae,* supporting appellant.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is an appeal from a decision of the Supreme Court of Wisconsin, arising from an order of the County Court of Milwaukee County, levying certain death taxes on the estate of Fred A. Miller, deceased, under the applicable statutes of Wisconsin. The question for decision is the validity of the Wisconsin emergency tax on inheritances, Wis. Stat. (1947) § 72.74 (2), when tested in the light of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The decedent died testate on December 19, 1943, a resident of Wisconsin. At death his gross estate was $7,849,714.84. Property located in Wisconsin was valued at $6,869,778.61; the remainder of $979,936.23 consisted of real and tangible personal property situated in the States of Illinois and Florida.[1]

The Commissioner of Internal Revenue assessed net federal taxes against the estate in the sum of $3,076,131.19, inclusive of the 80% of the basic federal tax subject to credit for state estate taxes as provided by § 301 (b) of the United States Revenue Act of 1926, 44 Stat. 70, as amended, 26 U. S. C. § 813 (b). This 80% credit was the sum of $630,709.62.

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[1] The record does not reveal the exact nature of the property, and we have held that whether the property is "tangible" within the meaning of *Frick* v. *Pennsylvania,* 268 U. S. 473 (1925), *infra,* is a federal question. *Blodgett* v. *Silberman,* 277 U. S. 1 (1928). In this case, however, the parties and the court below agree that the property is clearly "tangible" within the *Frick* rule. We accept that assumption.

Wisconsin has a triad of death taxes known as (1) normal inheritance tax, (2) estate tax, and (3) emergency tax.

The normal Wisconsin inheritance tax, as levied by Wis. Stat. (1947) §§ 72.01 to 72.24, was in this case $220,682.12. It is levied only on property within the State of Wisconsin and is not in controversy here.

To take advantage of the credit provisions of the Revenue Act of 1926, the Wisconsin legislature also enacted an estate tax in the amount of 80% of the basic federal tax subject to credit, less "the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent." Wis. Stat. (1947) § 72.50. Wisconsin normal inheritance taxes as well as out-of-state taxes are deducted from the federal credit. The estate tax on this estate was computed at $352,701.79. However, this provision of the Wisconsin statutes is not under explicit attack here.

The only statute, the validity of which is involved in this appeal, is § 72.74 (2) of the Wisconsin statutes known as the Emergency Tax on Inheritances. The section under scrutiny provides:

> "In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1949 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

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As is apparent, computation of the additional emergency tax involves only four factors: (1) the amount of the 80% federal credit, (2) the taxes paid to other jurisdictions, (3) Wisconsin normal inheritance taxes, and (4) the 30% rate imposed. In applying the yardstick of this section to the decedent's estate, the Wisconsin authorities took the *total* of the 80% federal credit, that is $630,709.62, and first deducted from it the *taxes* paid to states other than Wisconsin—Illinois ($35,616.26) and Florida ($21,709.45)—and Wisconsin's normal inheritance tax ($220,682.12), which left $352,701.79. The tax due was then calculated by taking 30% of the latter amount, plus 30% of the normal inheritance tax. The result, $172,015.20, was levied as the emergency inheritance tax due.

It will be seen that as the taxing formula is reduced, the normal inheritance tax is no longer a factor in the computation. For while 30% thereof is added to 30% of the estate tax to give the emergency tax, the normal inheritance tax has already been subtracted in the computation of the basic estate tax. Hence, in extending the formula of the emergency tax, the inheritance taxes cancel.[2] What is left, other than out-of-state taxes, is simply 80% of the basic federal tax, rated and measured by the entire estate, regardless of situs, and therefore including the property located in Illinois and Florida.

The court below thought that the presence of 87.52% of Mr. Miller's property within Wisconsin justified its statement that the state taxed only Wisconsin property. And the state argues that the "other 20%" over the federal basic estate tax 80% credit "more than absorbs, or is, on any mathematical basis, attributable to" the 12.48% of property outside Wisconsin. But Wisconsin made but

[2] The formula is as follows:

30% × Wisconsin normal inheritance tax + 30% (80% federal basic tax − Wisconsin normal inheritance tax − taxes paid in Illinois and

80% of the federal tax its own; and as it did not apportion that 80% to property within the state, the presence of property therein is simply a fortuity which cannot help the taxing jurisdiction. See *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 683 (1899). The same must be said of deductions for out-of-state taxes, which have no necessary relation to the proportion of property outside Wisconsin.[3]

Florida). This reduces to: 30% (80% federal basic tax—taxes paid in Illinois and Florida).

Deductions authorized in the computation of the normal inheritance tax are thus of no significance.

The State's table of computation reads:

(1)	Wisconsin Normal Inheritance Taxes		$220,682.12
(2)	Wisconsin Estate Tax:—		
	80% of U. S. Estate Tax	$630,709.62	
	Less:—		
	(a) Wisconsin Normal Taxes (1) above	$220,682.12	
	(b) Illinois Inheritance Taxes	35,616.26	
	(c) Florida Inheritance Taxes	21,709.45	
	Total State Taxes	278,007.83	
	Difference is Wisconsin Estate Tax		352,701.79
(3)	Wisconsin Emergency Tax:—		
	Wisconsin Normal Taxes (1) above	$220,682.12	
	Wisconsin Estate Tax (2) above	352,701.79	
	Total	$573,383.91	
	Emergency Tax is 30%		172,015.20
	Total Wisconsin Inheritance Taxes		$745,399.11

[3] A different question might be presented, however, if the statute in question authorized computation to begin with 87.52% rather than all of the 80% federal credit. We intend to intimate no opinion as to that situation.

We think it clear that the order entered by the Supreme Court of Wisconsin authorized a tax on property rated and measured in part by tangible property, the situs of which was outside Wisconsin.

This Wisconsin may not do. In *Frick* v. *Pennsylvania,* 268 U. S. 473 (1925), Pennsylvania levied an inheritance tax based upon real and personal property wherever located. Mr. Frick's art collection was located in New York. In a unanimous opinion this Court ruled that Pennsylvania's statute, "in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid." Wisconsin's statute may be more sophisticated than Pennsylvania's, but in terms of ultimate consequences this case and the *Frick* case are one. It is quite unnecessary to know in either case what property is located within the taxing jurisdiction in order to compute the challenged exaction.

Nor are we inclined to discard the *Frick* rule. We have consistently upheld the domicile's levy when it was based upon intangible property with technical title without the jurisdiction. *Blodgett* v. *Silberman,* 277 U. S. 1 (1928). And the economic effects of tax burdens in the federal system cannot control our results, limited as we are to the words of the Fourteenth Amendment. *State Tax Commission of Utah* v. *Aldrich,* 316 U. S. 174, 181 (1942), citing Holmes, J., dissenting in *Baldwin* v. *Missouri,* 281 U. S. 586, 595 (1930). But when a state reaches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction. Since the state of location has all but complete dominion over the physical objects sought to be measured for tax, see *Green* v. *Van Buskirk,* 7 Wall. 139, 150 (1869); *Curry* v. *McCanless,* 307 U. S. 357, 363 (1939), and cases cited, no other state can offer a *quid pro quo.* A state is not equipped with

the implements of power and diplomacy without its boundaries which are at the root of the Federal Government's undoubted right to measure its tax upon foreign property. *United States* v. *Bennett,* 232 U. S. 299 (1914); see *Burnet* v. *Brooks,* 288 U. S. 378 (1933). And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce.[4]

We hold that Wisconsin's emergency inheritance tax is invalid insofar as it is measured by tangible property outside Wisconsin. The judgment must be reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Black dissents. He agrees that the Court's holding logically follows from its interpretation of the due process clause in the *Frick* case, but believes that so interpreted the clause gives a more expansive control over state tax legislation than the due process clause justifies.

Mr. Justice Douglas took no part in the consideration or decision of this case.

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[4] Of course we have refused to be governed by this consideration when so to do would have placed a premium upon the avoidance of all state taxes. *New York ex rel. New York C. & H. R. R. Co.* v. *Miller,* 202 U. S. 584, 597 (1906); *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63 (1911); cf. *Northwest Airlines* v. *Minnesota,* 322 U. S. 292 (1944). See *Commonwealth* v. *Pennsylvania Coal Co.,* 197 Pa. 551, 47 A. 740 (1901); *Norfolk & W. R. Co.* v. *Board,* 97 Va. 23, 32 S. E. 779 (1899).

COMMISSIONER OF INTERNAL REVENUE *v.* CONNELLY ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 57. Argued October 21, 1949.—Decided November 7, 1949.

A civil service employee of the Coast Guard who was enrolled temporarily during the war as an officer in the Coast Guard Reserve under the Coast Guard Auxiliary and Reserve Act, 14 U. S. C. § 307, but who served without compensation other than that of his civilian position and who performed after enrollment duties identical with those he had previously performed, is not entitled to the $1,500 exclusion from gross income provided by § 22 (b) (13) (A) of the Internal Revenue Code in the case of compensation received "for active service as a commissioned officer" in the military or naval forces. Pp. 258–262.

84 U. S. App. D. C. 260, 172 F. 2d 877, reversed.

The Tax Court sustained the Commissioner of Internal Revenue's disallowance of a claim by a taxpayer for exclusion of $1,500 from gross income provided by § 22 (b) (13) (A) of the Internal Revenue Code. 8 T. C. 848. The Court of Appeals reversed. 84 U. S. App. D. C. 260, 172 F. 2d 877. This Court granted certiorari. 337 U. S. 924. *Reversed,* p. 262.

Ellis N. Slack argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Lee A. Jackson* and *Irving I. Axelrad.*

Caesar L. Aiello argued the cause for respondents. With him on the brief was *A. Murray Preston.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The question we have here is whether respondent William I. Connelly, hereafter referred to as the taxpayer, is entitled to the $1,500 exclusion from gross income pro-

vided by § 22 (b) (13) (A) of the Internal Revenue Code.[1] The taxpayer claimed this additional allowance for the taxable years 1943 and 1944. The Commissioner disallowed the sum deducted. The Tax Court sustained the Commissioner, 8 T. C. 848, and the Court of Appeals reversed, one judge dissenting. 84 U. S. App. D. C. 260, 172 F. 2d 877. We granted certiorari. 337 U. S. 924.

On February 19, 1943, taxpayer was a civil service employee in the legal division of the Coast Guard. On that date he was enrolled as a lieutenant commander within one of the six classifications which constituted the temporary members of the Coast Guard Reserve.[2] His enrollment was under authority of the Coast Guard Auxiliary and Reserve Act which provided for the enrolling of "persons (including Government employees without pay other than the compensation of their civilian positions)." 55 Stat. 12, as amended, 56 Stat. 1021, 14 U. S. C. § 307. On April 24, 1944, he was reenrolled as a commander and his class was described as "Coast Guard Civil Service Employees."

After enrollment taxpayer performed duties identical with those which he had previously performed. At the time he was enrolled, his civil service rating was P–5. Later this rating was raised to P–6 and his rank was increased at the same time to that of commander. He received the same pay after enrollment that he had received as a civil service employee. He received overtime pay as a civil service employee, deductions were made from

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[1] As amended by Revenue Act of 1945, § 141 (a), 59 Stat. 571:

"(13) Additional allowance for military and naval personnel.—

"(A) In the case of compensation received . . . for active service as a commissioned officer . . . in the military or naval forces of the United States . . . so much of such compensation as does not exceed $1,500."

[2] These classifications and the organization of the Coast Guard Reserve are detailed in *Mitchell* v. *Cohen*, 333 U. S. 411, 412–14.

his pay for civil service retirement, and he was subject to civil service regulations as to annual and sick leave. If he had been injured or killed, he would have received benefits as a civil employee of the United States. He was still subject to the Selective Training and Service Act. In the case of sickness or disease contracted while on active duty, taxpayer was entitled to the same hospital and medical care as members of the regular Coast Guard, but dental care was not included. While on active duty he was required to wear the uniform of and he received the courtesies due his rank. He was subject to the laws, regulations and orders of the Coast Guard and to disciplinary action.

It is apparent that taxpayer had a dual status. He had a limited military status with the rank of lieutenant commander and later that of commander. He had also the status of a civil service employee, carefully so limited and with all the privileges incident to such status. He was given just enough military status to enable him effectively to carry out his duties. All considerations of an economic character pertaining to his employment by the Government were related to his civil service status.

In *Mitchell* v. *Cohen,* 333 U. S. 411, we held that one employed in a department of the Federal Government as a civil service employee who was enrolled temporarily in the Volunteer Port Security Force of the Coast Guard Reserve and who worked part-time as a reservist without pay was not an "ex-serviceman" within the meaning of the Veterans' Preference Act. Looking to the legislative history of that statute, we found that the over-shadowing purpose of the Act was to favor those who had a real record of military service.

The Court of Appeals found in this case that by the application of "long-established criteria—oath of office, military duty, and subjection to military discipline" taxpayer had acquired a military status and was thus entitled to the exclusion. We agree that he had a military status

for some purposes. But the question for tax purposes is whether he received his pay in that status. To come within § 22 (b)(13)(A), he must have received his compensation "for active service as a commissioned officer." We understand this to mean that if taxpayer received his pay *as a* commissioned officer, he would be entitled to the exclusion. It seems equally plain that if he received his pay *as a* civil service employee and served without military pay and allowances, he is not entitled to the claimed exclusion.[3] As in the *Cohen* case, the emphasis of the statute is on a military and not on a civilian status.

And it is clear that taxpayer received his compensation in a civilian status. As noted, § 307 of the Coast Guard Auxiliary and Reserve Act provided for the enrolling of "persons (including Government employees without pay other than the compensation of their civilian positions)." The Committee on Merchant Marine and Fisheries referred to the amendment by which the parenthetical phrase was added to the statute as being "advisable to clarify this authority [enrollment of temporary members without the pay of their military rank] and resolve any doubt of its applicability to Government employees by specifically providing for temporary membership in the Coast Guard Reserve of Government employees without military pay but with continuance in their civilian positions and the receipt of the compensation thereof." [4]

From the date of the enactment of the enrollment statute there seems to have been no deviation from the view

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[3] See Judge Edgerton, dissenting in part, below:

". . . I would be unable, in view of the rule that tax exemptions are strictly construed, to say that the compensation of a man who did not receive a commissioned officer's pay but served 'without pay other than the compensation of [his] civilian positions' was 'received . . . for active service as a commissioned officer.'" 84 U. S. App. D. C. at 263, 172 F. 2d at 880.

[4] H. R. Rep. No. 2525, 77th Cong., 2d Sess., 3 (1942). The Committee added that the amendment "would obviate any possible

that the taxpayer was to be paid as a civil service employee and not as a commissioned officer. His pay came from congressional appropriations allocated to civilian positions. His pay was at the civil service scale for his grade, with overtime pay and appropriate deductions for civil service retirement. His continuing civilian status is underlined by his receipt of a civil service promotion, from which his military promotion resulted. Indeed, the taxpayer's certificate of disenrollment described the duty performed as "Chief of Admiralty and Maritime Section having civil service status, receiving civilian but no military pay, and holding rank of Commander as a Temporary Member of the Coast Guard Reserve."

The Court of Appeals ignored the status in which taxpayer was compensated and gave effect to his military status which was provided only to facilitate the performance of his duties in wartime.[5] Taxpayer's rank was for the purpose of getting the job done, and not for the purpose of receiving compensation.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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impairment of the right of such employees to continue to receive the compensation of their civilian positions for the entire period of their performance of active Coast Guard duty as such temporary members. There will be little, if any, change in the nature of their duties after enrollment."

[5] Office Memorandum No. 13–43 issued by the Commandant of the Coast Guard on July 24, 1943, states:

"6. The attention of heads of offices and chiefs of divisions is invited to the fact that one of the principal reasons for the induction of civil service employees into the military establishment as temporary members of the Reserve was to obtain a homogeneous organization on a military basis and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged on exactly the same duty . . . ."

BOYD v. GRAND TRUNK WESTERN RAILROAD COMPANY.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 17. Argued October 11, 1949.—Decided November 7, 1949.

An agreement between a railroad and an employee injured by its negligence, which limits the venue of any action thereafter brought by the employee under the Federal Employers' Liability Act and deprives him of his right to bring an action in any forum authorized by the Act, is void as conflicting with the Act. Pp. 263–266.
321 Mich. 693, 33 N. W. 2d 120, reversed.

In a suit brought by a railroad company in a state court of Michigan to enjoin petitioner from prosecuting a Federal Employers' Liability Act case against it in Illinois, the trial court held that a contract restricting the choice of venue was void and dismissed the suit. The Michigan Supreme Court reversed. 321 Mich. 693, 33 N. W. 2d 120. This Court granted certiorari. 337 U. S. 923. *Reversed*, p. 266.

Melvin L. Griffith argued the cause for petitioner. With him on the brief were *Francis H. Monek* and *John L. Mechem*.

H. Victor Spike and *George F. Gronewold* argued the cause and filed a brief for respondent.

PER CURIAM.

In issue here is the validity of a contract restricting the choice of venue for an action based upon the Federal Employers' Liability Act.[1] Petitioner was injured in the course of his duties as an employee of respondent railroad in November, 1946. Twice during the following month petitioner was advanced fifty dollars by respondent. On each of these occasions petitioner signed an agreement

[1] 35 Stat. 65, as amended, 45 U. S. C. § 51.

stipulating that if his claim could not be settled and he elected to sue, "such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in the county or district where my injuries were sustained and not elsewhere." [2] Although this provision defined the available forum as either the Circuit Court of Calhoun County, Michigan, or the United States District Court for the Eastern District of Michigan, petitioner brought an action in the Superior Court of Cook County, Illinois. To enjoin petitioner's prosecution of the Illinois case, respondent instituted this suit. The Michigan Circuit Court held that the contract restricting the choice of venue was void and dismissed the suit. The Michigan Supreme Court reversed. 321 Mich. 693, 33 N. W. 2d 120 (1948).

Certiorari was granted, 337 U. S. 923 (1949), because the federal and state courts which have considered the issue have reached conflicting results.[3] We agree with

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[2] The agreement also provided that the sums advanced would be deducted from whatever settlement or recovery petitioner finally achieved. As to this, the proviso in § 5 of the Liability Act specifies "That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." Referring to this provision, and interpreting a contract similar to the one here involved, at least one federal court has held that "The contract to waive the venue provisions is of no effect . . . because there was no consideration for it." *Akerly* v. *New York C. R. Co.*, 168 F. 2d 812, 815 (C. A. 6th Cir. 1948).

[3] In accord with the decision below are: *Roland* v. *Atchison, T. & S. F. R. Co.*, 65 F. Supp. 630 (N. D. Ill. 1946); *Herrington* v. *Thompson*, 61 F. Supp. 903 (W. D. Mo. 1945); *Clark* v. *Lowden*, 48 F. Supp. 261 (D. Minn. 1942); *Detwiler* v. *Chicago, R. I. & P. R. Co.*, 15 F. Supp. 541 (D. Minn. 1936); *Detwiler* v. *Lowden*, 198 Minn. 185, 188, 269 N. W. 367, 369, 107 A. L. R. 1054, 1059 (1936). In conflict with the ruling before us are: *Krenger* v. *Pennsylvania R. Co.*,

those courts which have held that contracts limiting the choice of venue are void as conflicting with the Liability Act.

Section 6 of the Liability Act provides that "Under this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." It is not disputed that respondent is liable to suit in Cook County, Illinois, in accordance with this provision. We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . . ." The contract before us is therefore void.

Any other result would be inconsistent with *Duncan* v. *Thompson,* 315 U. S. 1 (1942). That opinion reviewed the legislative history and concluded that "Congress wanted § 5 to have the full effect that its comprehensive phraseology implies." 315 U. S. at 6. In that case as in this, the contract before the Court was signed after

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174 F. 2d 556 (C. A. 2d Cir. 1949), petition for certiorari denied this day, see *post,* p. 866; *Akerly* v. *New York C. R. Co.,* 168 F. 2d 812 (C. A. 6th Cir. 1948); *Fleming* v. *Husted,* 68 F. Supp. 900 (S. D. Iowa 1946); *Sherman* v. *Pere Marquette R. Co.,* 62 F. Supp. 590 (N. D. Ill. 1945); *Petersen* v. *Ogden U. R. & D. Co.,* 110 Utah 573, 175 P. 2d 744 (1946); cf. *Porter* v. *Fleming,* 74 F. Supp. 378 (D. Minn. 1947).

the injury occurred. The court below, in holding that an agreement delimiting venue should be enforced if it was reached after the accident, disregarded *Duncan*.

The vigor and validity of the *Duncan* decision was not impaired by *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625 (1948). We there distinguished a full compromise enabling the parties to settle their dispute without litigation, which we held did not contravene the Act, from a device which obstructs the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause.[4] And nothing in *Ex parte Collett*, 337 U. S. 55 (1949), affects the initial choice of venue afforded Liability Act plaintiffs. We stated expressly that the section of the Judicial Code there involved, 28 U. S. C. § 1404 (a), "does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously." 337 U. S. at 60.

The right to select the forum granted in § 6 is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur in the result but upon the grounds stated by Chief Judge Hand in *Krenger* v. *Pennsylvania R. Co.*, 174 F. 2d 556, at 560 (C. A. 2d Cir. 1949).

MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consideration or decision of this case.

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[4] See *Krenger, supra* note 3, 174 F. 2d at 558; *id.* at 561 (concurring opinion of L. Hand, C. J.); *Akerly, supra* note 3, 168 F. 2d at 815; *Petersen, supra*, note 3, 110 Utah at 579, 175 P. 2d at 747.

FAULKNER *v.* GIBBS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 19. Argued October 12, 1949.—Decided November 7, 1949.

The concurrent findings of the District Court and the Court of Appeals, that respondent's Patent No. 1,906,260 was valid and infringed by petitioner, are not shown to be clearly erroneous, and the judgment below is affirmed. *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U. S. 1, distinguished. Pp. 267–268.
170 F. 2d 34, affirmed.

In a suit brought by respondent against petitioner for infringement of a patent, the District Court held the patent valid and infringed. The Court of Appeals affirmed. 170 F. 2d 34. This Court granted certiorari. 336 U. S. 935. *Affirmed,* p. 268.

Robert W. Fulwider and *James P. Burns* argued the cause for petitioner. With them on the brief was *Harold W. Mattingly.*

Herbert A. Huebner argued the cause and filed a brief for respondent.

PER CURIAM.

The controversy here concerned the validity of Patent No. 1,906,260, issued to respondent, May 2, 1933, and its alleged infringement by petitioner. The District Court found the patent to be valid and infringed. The Court of Appeals for the Ninth Circuit affirmed, 170 F. 2d 34 (1948). Being moved by the petition for certiorari that there was a conflict with *Halliburton Oil Well Cementing Co.* v. *Walker,* 329 U. S. 1 (1946), we granted certiorari.

The record, briefs and arguments of counsel lead us to the view that *Halliburton, supra,* is inapposite. We there

held the patent invalid because its language was too broad at the precise point of novelty. In the instant case, the patent has been sustained because of the fact of combination rather than the novelty of any particular element.

After the suit in this cause was initiated in the District Court, petitioner modified his device. The courts below held that this modification was insubstantial and did not place petitioner outside the scope of respondent's patent.

We will not disturb the concurrent findings upon the issues presented to us in the petition for certiorari. We are not persuaded that the findings are shown to be clearly erroneous. The judgment is

Affirmed.

MR. JUSTICE BLACK is of the opinion that the language of the claims was too broad at the precise point where there was novelty, if there was novelty anywhere.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

REILLY, POSTMASTER, *v.* PINKUS, TRADING AS AMERICAN HEALTH AIDS CO., ALSO KNOWN AS ENERGY FOOD CENTER.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 31. Argued October 13, 1949.—Decided November 14, 1949.

1. In a fraud-order proceeding under 39 U. S. C. §§ 259, 732, it was shown that respondent had made expansive claims in advertisements regarding the efficacy and safety of his fat-reducing plan, which consisted of a diet and the taking of small quantities of granulated kelp containing iodine. Testimony of expert witnesses, based upon their general medical knowledge, was slightly conflicting as to the value of iodine for this purpose; but they agreed that the recommended diet might prove harmful to some persons. *Held:* The evidence was sufficient to support a finding by the Postmaster General that the efficacy of respondent's reducing plan was misrepresented in his advertising. Pp. 270–275.

   (a) *American School of Healing* v. *McAnnulty,* 187 U. S. 94, does not bar a finding of fraud whenever there is the least conflict of opinion as to curative effects of a remedy. Pp. 273–274.

   (b) If made with intent to deceive, misrepresentations such as were made here fall squarely within the type which in *Leach* v. *Carlile,* 258 U. S. 138, were held to justify findings of fraud. Pp. 274–275.

2. Government witnesses based their expert testimony in part on certain medical books, and respondent was not permitted to cross-examine them about statements contained in other medical books. The presiding officer adopted the prosecutor's view that good faith was not a defense. The Postmaster General found that the efficacy of respondent's reducing plan was misrepresented in his advertising and issued a fraud order. *Held:* The present fraud order should not be enforced; but the proceedings may be reopened to permit additional hearings should the Postmaster General choose to do so. Pp. 275–277.

   (a) It was prejudicial error not to permit respondent to cross-examine the Government's witnesses as to statements contained in other medical books, even though some of them were merely medical dictionaries. P. 275.

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(b) This error was not cured by having the fact-finder examine the excluded material subsequently. Pp. 275–276.

(c) In postoffice fraud cases, proof of fraudulent purpose is essential: It is not sufficient to prove merely that an incorrect statement was made. P. 276.

(d) One against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue of his purpose to deceive. P. 276.

(e) The strikingly different consequences of cease-and-desist orders issued by the Federal Trade Commission and fraud orders issued by the Postmaster General emphasize the importance of limiting the latter to instances where actual fraud is clearly proved. P. 277.

170 F. 2d 786, affirmed.

A District Court enjoined enforcement of a fraud order issued by the Postmaster General. 61 F. Supp. 610; 71 F. Supp. 993. The Court of Appeals affirmed. 170 F. 2d 786. This Court granted certiorari. 337 U. S. 906. *Affirmed,* p. 277.

Robert L. Stern argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Cecelia Goetz.*

Bernard G. Segal argued the cause for respondent. With him on the brief was *Irving R. Segal.*

Mr. Justice Black delivered the opinion of the Court.

Federal statutes have long authorized the Postmaster General to forbid delivery of mail and payment of money orders to "any person or company" found, "upon evidence satisfactory" to him, to be "conducting any . . . scheme or device for obtaining money . . . through the mails by means of false or fraudulent pretenses, representations, or promises . . . ."[1] Following a hearing the Postmaster

[1] R. S. 3929, as amended, 39 U. S. C. § 259; R. S. 4041, as amended, 39 U. S. C. § 732.

General issued such an order restricting respondent's use of the mails.[2]

The representations on which the order is based relate to respondent's anti-fat treatment, nationally advertised under the name of "Dr. Phillips' Kelp-I-Dine Reducing Plan." "Kelp-I-Dine" is a name used by respondent for granulated kelp, a natural seaweed product containing iodine. The Reducing Plan is twofold: It requires users to take one-half teaspoonful of "Kelp-I-Dine" per day, and suggests following a recommended daily diet which accompanies the vials of kelp.

Respondent's advertisements made expansive claims for its plan. They represented that persons suffering from obesity could "eat plenty" and yet reduce 3 to 5 pounds in a week surely and easily, without "tortuous diet" and without feeling hungry. Unhappy people eager to reduce but also eager to eat plenty were repeatedly reassured with alluring but subtly qualified representations such as these: "Remember with the Kelpidine Plan, you don't cut out ice cream, cake, candy, or any other things you like to eat. You just cut down on them." The alleged safety of the remedy and extraordinary efficacy of kelp were emphasized in advertisements stating that it "makes no difference if you are 16 or 60, or if you have diabetes, rheumatism or any other ailment. Kelpidine is always safe and doctors approve the Kelpidine plan. You simply take a half teaspoon of Kelpidine once each day and eat three regular sensible meals. Kelpidine decreases your appetite."

Two doctors with wide general knowledge in the field of dietetics and treatment for obesity were called by the Government in the fraud hearing. They testified

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[2] The order did not forbid delivery of mail to respondent Pinkus individually. It did forbid delivery to trade names used by respondent Pinkus, "American Health Aids Company and Energy Food Center, and their officers and agents as such . . . ."

that iodine, to which respondent chiefly attributed the fat-reducing powers of kelp, is valueless as an anti-fat; that kelp would not reduce hunger; that the suggested diet was too drastic to be safe for use without medical supervision, particularly where users suffered from chronic diseases such as diabetes and heart trouble. The one physician called by respondent testified that iodine was used by physicians as a weight reducer, and expressed his judgment that it did have value for such use. Even he, however, conceded that the daily dosage of iodine to reduce weight would be fifty to sixty times more than the iodine in respondent's daily dosage of kelp. The respondent's witness also admitted that the recommended diet was "rigid," and might prove harmful to persons suffering from tuberculosis, anemia, or heart disease.

The findings of the Postmaster General were that kelp is valueless as a weight reducer and that whatever efficacy there was in the remedy lay in the diet recommendations. He also found that the diet was neither uniformly safe nor harmless and might be particularly dangerous for persons afflicted with heart and kidney troubles; that the diet could not, as represented, be pursued in ease and comfort, without hunger, while eating the things respondent had led people to believe they could. On these findings the fraud order was entered.

The District Court granted an injunction against enforcement of the fraud order on the ground that the order was unsupported by factual evidence.[3] Asserting that there was "no exact standard of absolute truth" against which respondent's advertisements could be measured, the court held that the testimony of the two doctors on which the Government's case rested was reduced by the conflicting testimony of respondent's witness to the status of mere opinion. As such, the evidence was held insufficient

[3] 71 F. Supp. 993. See also 61 F. Supp. 610.

under the rule laid down by this Court in *American School of Healing* v. *McAnnulty,* 187 U. S. 94. The Court of Appeals affirmed on substantially the same ground.[4] Both courts distinguished *Leach* v. *Carlile,* 258 U. S. 138, where we held that a difference of opinion as to whether a product had any value at all did not bar a fraud order based on claims of far greater curative powers than the product could actually have. Important questions concerning the scope of the *McAnnulty* case and the sufficiency of evidence to support postoffice fraud orders prompted us to grant certiorari.

First. It is contended here, as both courts below held, that the findings of the Postmaster General must be set aside under the rule of the *McAnnulty* case. There the Postmaster General had forbidden use of the mails upon finding as a fact that petitioner was guilty of falsehood and fraud in obtaining money by representations based on claims that the "mind of the human race is largely responsible for its ills, . . . and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to . . . ." This Court set aside the fraud order, pointing out that there were two widely held schools of opinion as to whether the mind could affect bodily diseases, and that scientific knowledge had not advanced to the point where an actual intent to deceive could be attributed to one who asserted either opinion. Thus there was "no exact standard of absolute truth by which to prove the assertion false and a fraud." At best, testimony either way was held to be no more than "opinion" in a field where imperfect knowledge made proof "as of an ordinary fact" impossible.

Respondent appears to argue that the *McAnnulty* case bars a finding of fraud whenever there is the least conflict

[4] 170 F. 2d 786.

of opinion as to curative effects of a remedy. The contention seems to be that even the testimony of the most experienced medical experts can never rise above a mere "opinion" unless the expert has made actual tests of the drug to determine its effects in relation to the particular representations alleged to be false. The *McAnnulty* holding did not go so far. We do not understand or accept it as prescribing an inexorable rule that automatically bars reliance of the fact-finding tribunal upon informed medical judgment every time medical witnesses can be produced who blindly adhere to a curative technique thoroughly discredited by reliable scientific experiences. But we do accept the *McAnnulty* decision as a wholesome limitation upon findings of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet been crystallized in the crucible of experience. For in the science of medicine, as in other sciences, experimentation is the spur of progress. It would amount to condemnation of new ideas without a trial to give the Postmaster General power to condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity.

In this case there is conflict, though slight, as to whether kelp or iodine is valueless as a weight reducer. But even if we assume that medical opinion is yet in a state of flux on this question, we think that there was sufficient evidence to support the findings that the efficacy of the "Reducing Plan" as a whole was misrepresented in respondent's advertising. And we think those misrepresentations went beyond permissible "puffing" of a seller's wares; they were material representations on which credulous persons, eager to reduce, were entitled to rely. Despite subtle qualifying phrases it is difficult to read these advertisements as a whole without receiving the impression that, contrary to facts justifiably found by the Postmaster General, kelp is a sure and drastic weight

reducer; that a user can reduce without uncomfortably restricting his usual ample diet of fattening foods; that the treatment is absolutely safe and harmless to people of all ages, to the ill and the well. See *Donaldson* v. *Read Magazine,* 333 U. S. 178, 188–189. These representations, if made with intent to deceive, fall squarely within the type which in *Leach* v. *Carlile,* 258 U. S. 138, were held to justify findings of fraud.

Second. Nevertheless we are constrained to hold that the present fraud order should not be enforced. It has been pointed out that the doctors' expert evidence rested on their general professional knowledge. To some extent this knowledge was acquired from medical text books and publications, on which these experts placed reliance. In cross-examination respondent sought to question these witnesses concerning statements in other medical books, some of which at least were shown to be respectable authorities. The questions were not permitted. We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.

Petitioner seeks to justify exclusion of cross-examination based on some of these books by pointing out that they were merely medical dictionaries. Government experts testified they would not consult the dictionaries to ascertain the efficacy of a remedy, although they kept and used them for other purposes. But the books did assert the use of kelp as a fat reducer, and to some extent this tended to refute testimony by government experts that no reputable physicians would accept kelp or iodine as a weight reducer.

It is also contended that the error in restricting cross-examination was harmless here because the memorandum

of the fact-finding official indicated that he had read the excluded materials and would have made the same adverse findings had the materials been held admissible. But the object of using the books on cross-examination was to test the expert's testimony by having him refer to and comment upon their contents. Respondent was deprived of this opportunity. The error of this deprivation could not be cured by having the fact-finder subsequently examine the material.

Moreover, the issues in postoffice fraud cases make such cross-examination peculiarly appropriate. Proof of fraudulent purposes is essential—an "actual intent to deceive." See *Seven Cases* v. *United States,* 239 U. S. 510, 517. Consequently fraud under the mail statutes is not established merely by proving that an incorrect statement was made. An intent to deceive might be inferred from the universality of scientific belief that advertising representations are wholly unsupportable; conversely, the likelihood of such an inference might be lessened should cross-examination cause a witness to admit that the scientific belief was less universal than he had first testified.

The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. And what we have said is not to be taken as removing this discretion or as a compulsory opening of the gates for floods of medical volumes, even where shown to be authoritative. But in this kind of case as in others, one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue of his purpose to deceive. And in this case any holding of harmless error is precluded by the fact that the assistant solicitor presiding at the hearings adopted the prosecutor's view that respondent was to be barred from using the mails "regardless of the ques-

tion of good faith, even if the respondent believed in all of his representations . . . if they were false as a matter of fact."

It is not amiss to point out that the Federal Trade Commission does have authority to issue cease-and-desist orders in cases like this without findings of fraud. 15 U. S. C. § 45 (a), (b); *Federal Trade Comm'n* v. *Algoma Co.*, 291 U. S. 67, 81. But that remedy does not approach the severity of a mail fraud order. In *Federal Trade Comm'n* v. *Raladam Co.*, 316 U. S. 149, for instance, a business advertising its anti-fat product with extravagant statements similar in many respects to those of respondent here was ordered to cease and desist from making such statements. Except for this, the business was left free to sell its product as before. Unlike the Postmaster General, the Federal Trade Commission cannot bar an offender from using the mails, an order which could wholly destroy a business. See Brandeis, J., dissenting in *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 417 *et seq.* The strikingly different consequences of the orders issued by the two agencies on the basis of analogous misrepresentations emphasize the importance of limiting Postoffice Department orders to instances where actual fraud is clearly proved.

The judgment of the Court of Appeals is affirmed, without prejudice to a reopening of the proceedings against respondent to permit additional hearings should the Postmaster General choose to do so.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

OAKLEY *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

NO. 28. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued October 17–18, 1949.—Decided November 14, 1949.

1. Under § 8 (c) of the Selective Training and Service Act of 1940, the expiration of one year of reemployment of a veteran by his preservice employer does not terminate the veteran's right to the seniority to which he is entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment. *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, distinguished. Pp. 279–285.
2. A United States District Court could entertain a complaint filed by a veteran to enforce his right to such seniority, even though the complaint was not filed until nearly three months after the expiration of such year of reemployment. Pp. 284–285.

170 F. 2d 1008; 171 F. 2d 128, reversed.

The District Court dismissed two actions brought by veterans under § 8 (e) of the Selective Training and Service Act of 1940 to enforce their rights to seniority under § 8. The Court of Appeals affirmed. 170 F. 2d 1008; 171 F. 2d 128. This Court granted certiorari. 336 U. S. 943. *Reversed and remanded*, p. 285.

Morton Liftin argued the cause for petitioners. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Stanley M. Silverberg* and *Samuel D. Slade.*

C. S. Landrum argued the cause for respondent in No. 28. With him on the brief was *H. T. Lively.*

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*Together with No. 29, *Haynes* v. *Cincinnati, New Orleans & Texas Pacific Railway Co. et al.*, also on certiorari to the same court.

Cornelius J. Petzhold argued the cause for respondent in No. 29. With him on the brief were *Carl M. Jacobs, W. S. Macgill* and *Sidney S. Alderman.*

Richard R. Lyman argued the cause for System Federation No. 91 et al., respondents in Nos. 28 and 29. With him on the brief were *James Park, Clarence M. Mulholland* and *Edward J. Hickey.*

MR. JUSTICE BURTON delivered the opinion of the Court.

In both No. 28 and No. 29, the issue is whether, under the Selective Training and Service Act of 1940,[1] one year of reemployment of a veteran by his preservice employer terminated that veteran's right to the seniority to which he was entitled by virtue of that Act's treatment of him as though he had remained continuously in his civilian employment. For the reasons hereinafter stated, and pursuant to our previous decisions, our answer is "No." In No. 29, there is the further question whether, after the expiration of such year, a United States District Court could entertain a complaint filed by the veteran to enforce his right to such seniority. Our answer is "Yes."

In each case, a veteran sought, in the United States District Court for the Eastern District of Kentucky, a declaratory judgment and an order restoring him to the seniority which he claimed he would have had if he had remained continuously in his civilian employment. In No. 28, Oakley, the petitioner, alleged that when he was inducted into the Armed Forces on May 7, 1944, he was employed as a locomotive machinist at Loyall, Kentucky,

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[1] See especially, § 8 (a), (b), (c) and (e), 54 Stat. 890, as amended, 56 Stat. 724, 58 Stat. 798, 60 Stat. 341, 50 U. S. C. App. § 308 (a), (b), (c) and (e). See also, *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 278, 280, 281, for reprints of the material portions of the Act.

by the respondent, Louisville & Nashville Railroad Company; that, on May 22, 1946, he was honorably discharged from the Armed Forces; that, on July 17, 1946, he was reemployed by the respondent as a locomotive machinist with seniority from that date; that, on July 1, 1945, while he was with the Armed Forces, the respondent's Loyall Shop was transferred to Corbin, Kentucky; "that had he not been in the Armed Forces he would have been transferred to the Corbin Shop with seniority from July 1, 1945, . . ."; and that, because of the respondent's failure to credit him with seniority from the earlier date, he has been subjected to certain disadvantages in working hours and to an increased possibility of being laid off from his employment. He filed his complaint, April 14, 1947, under § 8 (e) of the Selective Training and Service Act of 1940, 54 Stat. 891, as reenacted, 60 Stat. 341, 50 U. S. C. App. § 308 (e). The court, on its own motion, assigned the case for argument "upon the question whether, under the opinion of the Supreme Court in The Trailmobile Company, et al., v. Whirls (No. 85, April 14, 1947), the cause has been rendered moot by the expiration of the statutory year to which Section 8 (c) of the Selective Training and Service Act limited plaintiff's right to any special or preferential standing in respect to restored seniority." Thereupon, the collective bargaining agent of the machinist employees of the respondent, which had intervened as a defendant, moved to dismiss the cause on the ground that more than one year had elapsed since the date of the petitioner's restoration to his employment. This motion is here considered upon the basis of the facts pleaded in the complaint.[2]

[2] The respondent previously had answered, filed a request for admissions under Rule 36, Federal Rules of Civil Procedure, received petitioner's admissions, and moved for summary judgment on the pleadings, the admissions, and an affidavit filed in support of the mo-

In No. 29, Haynes, the petitioner, alleged that, when he enlisted in the Armed Forces on February 1, 1942, he was employed as a machinist helper at Somerset, Kentucky, by the respondent, Cincinnati, New Orleans and Texas Pacific Railway Company (originally sued as the Southern Railway System); that, on October 31, 1945, he was honorably discharged from the Armed Forces; that, on November 16, 1945, he was reemployed by the respondent as a machinist helper, with seniority from that date; "that during his service in the Armed Forces the defendant company promoted six helper machinists to helper apprentices, and that these six men were junior in seniority to himself, and that had he not entered the Armed Forces as above mentioned he would have been promoted to helper apprentice and would have been given the pay as such, . . ."; and that such rate of pay exceeded that of the petitioner during his reemployment. He filed his complaint, February 14, 1947, asking for restoration to his claimed status and for the additional compensation to which that status would have entitled him. The respondent answered, but certain intervening defendants, following a procedure similar to that in No. 28, filed a motion to dismiss the cause for the reasons there stated.

The District Court heard the motions together and dismissed both actions.[3] The Court of Appeals for the Sixth

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tion. In the meantime, System Federation No. 91 of the Railway Employes' Department of the American Federation of Labor, acting on its own behalf and as the collective bargaining agent of respondent's machinist employees, was permitted to intervene and to answer. It then filed the motion to dismiss the cause which was acted upon by the court. Accordingly, neither the answers nor the motion for summary judgment are before us, and we have considered the case on the petitioner's allegations in his complaint.

[3] In No. 28, the court said:

"This cause coming on to be heard on the motion of the intervening defendants to dismiss the cause on the ground that the question pre-

Circuit affirmed. 170 F. 2d 1008; 171 F. 2d 128. We granted certiorari, 336 U. S. 943, because of the close relation of these dismissals to our decisions in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, and *Trailmobile Co.* v. *Whirls*, 331 U. S. 40.

The court below recognized that § 8 (c)[4] granted to the respective veterans special statutory protection against discharge without cause and against loss of certain benefits during the first year of their reemployment. That court, however, concluded also that the expiration of that year not only terminated the veteran's right to such special statutory protection, but likewise automatically terminated his right to the seniority in the restored position which he would have had if he had remained continuously in his civilian employment. That additional conclusion is not justified by the opinions of this

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sented has become moot, because more than one year has elapsed since the date of the plaintiff's restoration to employment with the defendant, L. & N. Railroad Company, and the Court being advised, it is ordered and adjudged that said motion be, and the same is hereby, sustained, and this action is now dismissed as moot, without cost to either the plaintiff, or the defendant, or the intervening defendants."

In No. 29, the entry was the same except for the name of the defendant railway.

[4] "SEC. 8. . . .

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." 54 Stat. 890, as reenacted, 60 Stat. 341, 50 U. S. C. App. § 308 (c).

Court or by the terms of the Act. We reserved the point in the *Trailmobile* case, *supra:*

> "We find it unnecessary therefore to pass upon petitioners' position in this case, namely, that all protection afforded by virtue of § 8 (c) terminates with the ending of the specified year. We hold only that so much of it ends then as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration. We expressly reserve decision upon whether the statutory security extends beyond the one-year period to secure the reemployed veteran against impairment in any respect of equality with such a fellow worker." (At p. 60.)

In the *Fishgold* case, we did not deal with the effect, if any, upon a veteran's seniority, of the expiration of his first year of reemployment. We there dealt with the initial terms of his restored position. We stated, in effect, that an honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment. *Fishgold* v. *Sullivan Corp.,* 328 U. S. 275, 284–285; see also, *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521, 526. In the *Trailmobile* case, *supra,* at pages 56 and 60, we dealt with the one year of special statutory protection given to the veteran in his restored position. We said, in effect, that this provision protected him not only from the total loss of that position by "discharge" from it "without cause," but that it also pro-

tected him, for one year, against the loss of certain other benefits incidental to his restored position.

The instant cases take us one step further. In them we hold that the expiration of the year did not terminate the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment; nor did it open the door to discrimination against him, as a veteran. Section 8 (c) of the Act requires that the veteran shall be restored to his position "without loss of seniority, ..." He therefore assumes, upon his reemployment, the seniority he would have had if he had remained in his civilian employment. His seniority status secured by this statutory wording continues beyond the first year of his reemployment, subject to the advantages and limitations applicable to the other employees.

In the instant cases, the respective complaints stated, in effect, that the complainants therein had not been restored to the places to which they were entitled on the escalators of their respective civilian employments. In No. 28, the allegation was that the petitioner was entitled, by virtue of the status he would have enjoyed had he remained continuously in his civilian employment, to the seniority of a locomotive machinist at Corbin from July 1, 1945, rather than from July 17, 1946. If he were entitled to the higher rating upon his reemployment, the Act did not deprive him of that rating merely by virtue of the expiration of his first year of reemployment. The motion to dismiss this action because of the expiration of that year, accordingly, should have been denied.

In No. 29, we reach the same result. That result is not affected by the failure of the veteran, in this case, to file his complaint until nearly three months after the expiration of his first year of reemployment. The Act did not establish a one-year statute of limitations upon the asser-

tion of the veteran's initial rights of reemployment. It added special statutory protection, for one year, against certain types of discharges or demotions that might rob the veteran's reemployment of its substance, but the expiration of that year did not terminate the right of the veteran to the seniority to which he was, in the first instance, entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment.

The judgment of the Court of Appeals in each case is therefore reversed and the respective causes are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

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UNITED STATES ET AL. *v.* CAPITAL TRANSIT COMPANY ET AL.

NO. 40. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.*

Argued October 20–21, 1949.—Decided November 14, 1949.

1. Under this Court's decision in *United States* v. *Capital Transit Co.*, 325 U. S. 357, the Interstate Commerce Commission still has jurisdiction under the Motor Carrier Act to prescribe joint through fares for the transportation of passengers by the Capital Transit Co. and connecting Virginia lines between the District of Columbia and certain nearby points in Virginia—even though, since that decision, active warfare has ended, the number of such passengers has been reduced, the Capital Transit Co. has discontinued running any busses from the District of Columbia into Virginia, and its share of such interstate traffic is now confined to carrying passengers between residential sections and the business section of the District of Columbia, where they transfer to or from other lines running between the District of Columbia and Virginia. Pp. 288–291.
2. This Court's decision in *United States* v. *Yellow Cab Co.*, 332 U. S. 218, does not conflict with its prior holding that such transportation was part of a continuous stream of interstate transportation. P. 290.
3. The Commission's finding, made in the prior proceedings, that its exercise of jurisdiction was necessary to a national transportation system "adequate to meet the needs of . . . the national defense" is still supported by substantial evidence, notwithstanding that the nation is no longer engaged in active warfare and there are fewer Army and Navy employees at the Virginia installations. Pp. 290–291.
4. Since the record in this case fails to show that there was properly presented to the Commission for its determination any issue as to whether the joint rates in question are confiscatory, that question is not ripe for judicial review. P. 291.

Reversed.

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*Together with No. 41, *Washington, Virginia & Maryland Coach Co. et al.* v. *Capital Transit Co. et al.*, also on appeal from the same court.

A three-judge District Court enjoined enforcement of an order of the Interstate Commerce Commission putting into effect a rate order of the Interstate Commerce Commission sustained by this Court in *United States* v. *Capital Transit Co.*, 325 U. S. 357. On appeal to this Court, the judgment of the District Court is *reversed,* p. 291.

Philip Elman argued the cause for the United States and the Interstate Commerce Commission, appellants in No. 40. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, Joseph W. Bishop, Jr., William J. Hickey, Richard E. Guggenheim, Daniel W. Knowlton* and *Edward M. Reidy.*

Manuel J. Davis argued the cause for the Washington, Virginia & Maryland Coach Co., and *S. Harrison Kahn* argued the cause for the Alexandria, Barcroft & Washington Transit Co., and filed a brief for those appellants in No. 41.

Samuel O. Clark, Jr. argued the cause and filed a brief for the Capital Transit Co., appellee in Nos. 40 and 41. With him on the brief were *Edmund L. Jones, F. G. Awalt* and *Daryal A. Myse.*

Lloyd B. Harrison argued the cause for the Public Utilities Commission of the District of Columbia, appellee in Nos. 40 and 41. With him on the brief was *Vernon E. West.*

By special leave of Court *Henry E. Ketner* argued the cause and filed a brief for the State Corporation Commission of Virginia et al., as *amici curiae,* urging affirmance.

John O'Dea filed a brief as People's Counsel, Public Utilities Commission of the District of Columbia, appellee in No. 40.

PER CURIAM.

In *United States* v. *Capital Transit Co.*, 325 U. S. 357, we upheld the jurisdiction of the Interstate Commerce Commission to regulate certain of Capital Transit's bus and streetcar rates. The rates involved were in two different categories. Transit operated, as it still does, a bus and streetcar system within the District connecting the residential area with the central business area. It was also one of four bus companies carrying passengers from that central business area to the Pentagon Building and other Defense establishments located just across the Potomac in Virginia. Each day thousands of Government employees living in the District boarded Transit's streetcars near their residences, rode to the District's business area, and there transferred to one of the Virginia busses for carriage to the nearby Virginia establishments. In the above case we sustained a Commission order fixing a through fare for the entire trip between the District residential area and the Virginia governmental installations. Transit had strongly urged that its bus and streetcar transportation between residential and business areas, being wholly within the District, could not be treated as part of an interstate movement. For reasons stated in our former opinion we rejected Transit's contention, holding that the daily stream of Government workers from the District to Virginia and back again was an interstate movement and therefore subject to regulation by the Commission. This holding applied to Transit carriage even where Transit passengers traveled between the District and Virginia on other bus lines. Transit also contended that jurisdiction of the Commission was precluded by a proviso in § 216 (e) of the Motor Carrier Act exempting "intrastate transportation" of motor carriers from regulation by the Commission. This contention was repeated on motion for rehearing. We rejected it.

Our holding that Transit's part of the District-Virginia movements was "interstate transportation" necessarily made the § 216 (e) exemption inapplicable.

After our holding the Commission entered a new order putting into effect the rate order we had sustained. In the present cases, here on appeal from a three-judge District Court under 28 U. S. C. §§ 1253 and 2101 (b), the new order was enjoined[1] on the ground that Transit's transportation, which we had held to be interstate, had now become "intrastate." On the same ground, that court also held that Transit was exempt from Commission jurisdiction under the proviso in § 216 (e). The District Court also cited to support its ruling our recent decision in *United States* v. *Yellow Cab Co.*, 332 U. S. 218.

The District Court apparently took the position that changed conditions since our decision in the prior *Transit* case had deprived the Commission of its jurisdiction. When we sustained the Commission's order in that case, Transit was itself operating one of the four bus lines carrying Government workers from the District central business area to Virginia. It issued transfers to passengers on its busses and streetcars between the District business and residential areas. These transfers were good for rides on Transit's own District-Virginia busses, but Transit would not give transfers good on the three competitive lines. We adverted to and relied on this situation as one of the reasons supporting the Commission's requirement that Transit make similar arrangements for through fares with the other lines. April 1, 1947, Transit abandoned

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[1] The District Court simultaneously enjoined enforcement of two subsequent related Commission orders. One order declined to permit cancellation of the prescribed through rates and schedules. 47 M. C. C. 205. The other increased the former prescribed maximum rates and provided for divisions of through fares among the companies carrying the District-Virginia passengers. 270 I. C. C. 651.

its District-Virginia bus line. Because of this the District Court held that since that date all of Transit's carriage of Virginia-bound passengers has been "intrastate transportation."

The District Court's annulment of the Commission's order on the above ground cannot stand. Our previous holding was that all of Transit's intra-District carriage of passengers bound to and from the Virginia establishments was part of an "interstate" movement and therefore subject to Commission regulation throughout, upon proper Commission findings. *United States* v. *Yellow Cab Co., supra,* does not conflict with our prior holding that Transit's transportation was part of a continuous stream of interstate transportation. We adhere to that holding. Transit's intra-District streetcar and bus transportation of passengers going to and from the Virginia establishments is an integral part of an interstate movement.

In support of the District Court's judgment it is urged that there was no substantial evidence to support the Commission's findings that its exercise of jurisdiction was necessary to a national transportation system "adequate to meet the needs of . . . the national defense." The argument seems to be that the Commission should have altered this finding made in the prior proceedings because the nation is no longer at war. Another factor pointed out is that there are now fewer Army and Navy workers who work in the Virginia installations. Neither of these arguments is sufficient to justify setting aside findings made by the Commission on this point. The evidence before the Commission in the two proceedings indicates that the same reasons exist for Commission action now as before. And despite attempted interference with the Commission's power by the Public Utilities Commission of the District, it is still true that neither the District

nor Virginia has adequate power to regulate the through rates for this daily stream of interstate travel.

It is also argued here that the orders should be set aside because they are confiscatory. But the record fails to show that this issue was properly presented to the Commission for its determination. Therefore the question of confiscation is not ripe for judicial review.

We have examined other contentions urged in support of the District Court's judgments and find that all are without merit.

The judgments of the District Court in these cases are reversed and the causes are remanded to it with directions to dismiss these actions.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE JACKSON dissenting.

The opinion in our view bases the judgment on a holding "that all of Transit's intra-District carriage of passengers bound to and from the Virginia establishments was part of an 'interstate' movement and therefore subject to Commission regulation throughout, upon proper Commission findings." Since the Court does not rest the applicability of the Motor Carrier Act, 49 Stat. 543, to the Capital Transit Company on the existence of Transit's lines to Maryland, we, too, lay that problem aside. We understand the Court to assert that the statute empowers the Commission to enter the contested order whether or not Transit operates admitted interstate routes.

The present case differs from the former case involving the operations of the Transit Company. 325 U. S. 357. In the earlier case Transit served Virginia areas in com-

petition with other interstate operators of busses. As the operator of interstate routes selling through tickets on its own lines, Transit was required also to sell and accept through tickets that were good for passage on other interstate lines. Such obligation was imposed by § 216 (e), the section prohibiting anything "unduly preferential or unduly prejudicial," and § 216 (c), the section regulating charges for voluntary through rates. 325 U. S. at 362.

Now Transit does not operate the interstate routes to the Virginia points. It is not an interstate carrier over the route for which it now is required to sell through tickets. Therefore, the Court's opinion finds it necessary to rely upon the stream of passengers between the District and Virginia to put Transit under the Motor Carrier Act as engaged in interstate commerce so far as it transports, in the District, passengers with an ultimate out-of-state destination. We do not believe the Act permits such a construction.

Clearly the Act is limited to operations in interstate commerce.[1] Congress has not used the full extent of its commerce power to reach incidents affecting interstate transportation. It has emphasized a contrary intention by providing for the exclusion from the coverage of the Act, in certain situations, of interstate passenger traffic in a municipality, contiguous municipalities or adjacent zones. § 203 (b) (8). Likewise the Act specifically bars the Commission from regulating intrastate transportation

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[1] "SEC. 202. (b) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission."

on the ground that it affects interstate transportation.[2] Since the Motor Carrier Act does not regulate carrier activities that merely affect interstate commerce, we think the stream of commerce theory inapplicable.[3] We cannot agree that intrastate carriage of passengers who have an intention to continue their journey across state lines by way of another and wholly unconnected company makes the first carrier a company engaged in interstate commerce under the Motor Carrier Act as to that transportation.

The Court's decision may have unfortunate results. Its unlimited language sweeps into the hands of the Commission the regulation of all local transportation that carries a large proportion of passengers destined for or arriving from out-of-state points. For example, the Court's ruling would seem to include the New York City commuter traffic moving by local bus, subway and streetcar service on its way to and from interstate busses.

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[2] "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever." § 216 (e).

[3] See *McLeod* v. *Threlkeld,* 319 U. S. 491; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1; *Stafford* v. *Wallace,* 258 U. S. 495.

BROWN *v.* WESTERN RAILWAY OF ALABAMA.

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

No. 43. Argued October 19, 1949.—Decided November 21, 1949.

In an action in a state court for damages under the Federal Employers' Liability Act, the trial court sustained a general demurrer to the complaint and dismissed the action. Under the state law, such a dismissal was a final adjudication barring recovery in any future state proceeding. The State Court of Appeals affirmed on the basis of a state rule of practice to construe pleadings "most strongly against the pleader." *Held:*

1. The construction of the complaint by the state court in accordance with state practice is not binding on this Court, which will itself construe the allegations of the complaint in order to determine whether petitioner has been denied a right of trial granted him by Congress. Pp. 295–296.

2. The complaint did set forth a cause of action and should not have been dismissed. Pp. 297–299.

77 Ga. App. 780, 49 S. E. 2d 833, reversed.

A state court sustained a general demurrer to a complaint claiming damages under the Federal Employers' Liability Act and dismissed the action. The Court of Appeals of Georgia affirmed. 77 Ga. App. 780, 49 S. E. 2d 833. The Supreme Court of Georgia denied certiorari. This Court granted certiorari. 336 U. S. 965. *Reversed and remanded,* p. 299.

Richard M. Maxwell argued the cause for petitioner. With him on the brief was *Thomas J. Lewis.*

Herman Heyman argued the cause for respondent. With him on the brief were *Arthur Heyman* and *Hugh Howell, Sr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner brought this action in a Georgia state court claiming damages from the respondent railroad under the Federal Employers' Liability Act. 45 U. S. C. § 51 *et seq.*

Respondent filed a general demurrer to the complaint on the ground that it failed to "set forth a cause of action and is otherwise insufficient in law." The trial court sustained the demurrer and dismissed the cause of action. The Court of Appeals affirmed, 77 Ga. App. 780, 49 S. E. 2d 833, and the Supreme Court of Georgia denied certiorari. It is agreed that under Georgia law the dismissal is a final adjudication barring recovery in any future state proceeding. The petition for certiorari here presented the question of whether the complaint did set forth a cause of action sufficient to survive a general demurrer resulting in final dismissal. Certiorari was granted because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts. See *Brady* v. *Southern R. Co.*, 320 U. S. 476.

First. The Georgia Court of Appeals held that "Stripped of its details, the petition shows that the plaintiff was injured while in the performance of his duties when he stepped on a large clinker lying alongside the track in the railroad yards. . . . The mere presence of a large clinker in a railroad yard can not be said to constitute an act of negligence. . . . In so far as the allegations of the petition show, the sole cause of the accident was the act of the plaintiff in stepping on this large clinker, which he was able to see and could have avoided." 77 Ga. App. 783, 49 S. E. 2d 835. The court reached the foregoing conclusions by following a Georgia rule of practice to construe pleading allegations "most strongly against the pleader." Following this local rule of construction the court said that "In the absence of allegations to the contrary, the inference arises that the plaintiff's vision was unobscured and that he could have seen and avoided the clinker." 77 Ga. App. 783, 49 S. E. 2d 835. Under the same local rule the court found no precise allegation that the particular clinker on which petitioner

stumbled was beside the tracks due to respondent's negligence.

It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from "substantive rights" granted by Congress in FELA cases, they are free to follow their own rules of "practice" and "procedure." To what extent rules of practice and procedure may themselves dig into "substantive rights" is a troublesome question at best as is shown in the very case on which respondent relies. *Central Vermont R. Co.* v. *White,* 238 U. S. 507. Other cases in this Court [1] point up the impossibility of laying down a precise rule to distinguish "substance" from "procedure." Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. See *American Ry. Exp. Co.* v. *Levee,* 263 U. S. 19, 21. And we cannot accept as final a state court's interpretation of allegations in a complaint asserting it. *First National Bank* v. *Anderson,* 269 U. S. 341, 346; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Covington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 595–596. This rule applies to FELA cases no less than to other types. *Reynolds* v. *Atlantic C. L. R. Co.,* 336 U. S. 207; *Anderson* v. *A., T. &*

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[1] *Angel* v. *Bullington,* 330 U. S. 183; *Guaranty Trust Co.* v. *York,* 326 U. S. 99; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239; *St. Louis, S. F. & T. R. Co.* v. *Seale,* 229 U. S. 156, 157; and see same case 148 S. W. 1099; *Toledo, St. L. & W. R. Co.* v. *Slavin,* 236 U. S. 454, 457–458; and see same case 88 Ohio St. 536, 106 N. E. 1077. Compare *Brinkmeier* v. *Missouri P. R. Co.,* 224 U. S. 268, with *Seaboard Air Line R. Co.* v. *Renn,* 241 U. S. 290.

S. F. R. Co., 333 U. S. 821; cf. *Lillie* v. *Thompson*, 332 U. S. 459.

Second. We hold that the allegations of the complaint do set forth a cause of action which should not have been dismissed. It charged that respondent had allowed "clinkers" and other debris "to collect in said yards along the side of the tracks"; that such debris made the "yards unsafe"; that respondent thus failed to supply him a reasonably safe place to work, but directed him to work in said yards "under the conditions above described"; that it was necessary for petitioner "to cross over all such material and debris"; that in performing his duties he "ran around" an engine and "stepped on a large clinker lying beside the tracks as aforesaid which caused petitioner to fall and be injured"; that petitioner's injuries were "directly and proximately caused in whole or in part by the negligence of the defendant . . . (a) In failing to furnish plaintiff with a reasonably safe place in which to work as herein alleged. (b) In leaving clinkers . . . and other debris along the side of track in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen, working therein and that petitioner would have to perform his duties with said yards in such condition."

Other allegations need not be set out since the foregoing if proven would show an injury of the precise kind for which Congress has provided a recovery. These allegations, fairly construed, are much more than a charge that petitioner "stepped on a large clinker lying alongside the track in the railroad yards." They also charge that the railroad permitted clinkers and other debris to be left along the tracks, "well knowing" that this was dangerous to workers; that petitioner was compelled to "cross over" the clinkers and debris; that in doing so he fell and was injured; and that all of this was in violation of the rail-

road's duty to furnish petitioner a reasonably safe place to work. Certainly these allegations are sufficient to permit introduction of evidence from which a jury might infer that petitioner's injuries were due to the railroad's negligence in failing to supply a reasonably safe place to work. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353. And we have already refused to set aside a judgment coming from the Georgia courts where the jury was permitted to infer negligence from the presence of clinkers along the tracks in the railroad yard. *Southern R. Co.* v. *Puckett,* 244 U. S. 571, 574, affirming 16 Ga. App. 551, 554, 85 S. E. 809, 811.

Here the Georgia court has decided as a matter of law that no inference of railroad negligence could be drawn from the facts alleged in this case. Rather the court itself has drawn from the pleadings the reverse inference that the sole proximate cause of petitioner's injury was his own negligence. Throughout its opinion the appellate court clearly reveals a preoccupation with what it deemed to be petitioner's failure to take proper precautions.[2] But as that court necessarily admits, contributory negligence does not preclude recovery under the FELA.

Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. "Whatever springes the State may set for those who are endeavoring to assert rights that the

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[2] That court among other things said: "In the absence of allegations to the contrary, the inference arises that the plaintiff's vision was unobscured and that he could have seen and avoided the clinker. . . . In so far as the allegations of the petition show, the sole cause of the accident was the act of the plaintiff in stepping on this large clinker, which he was able to see and could have avoided. It was he who, without any outside intervention, failed to look, stepped on the clinker, and fell." 77 Ga. App. 783, 49 S. E. 2d 835.

State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler, supra,* at 24. Cf. *Maty* v. *Grasselli Chemical Co.,* 303 U. S. 197. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved. See *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479.

Upon trial of this case the evidence offered may or may not support inferences of negligence. We simply hold that under the facts alleged it was error to dismiss the complaint and that petitioner should be allowed to try his case. *Covington Turnpike Co.* v. *Sandford, supra,* at 596; *Anderson* v. *A., T. & S. F. R. Co.,* 333 U. S. 821.

The cause is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.

Insignificant as this case appears on the surface, its disposition depends on the adjustment made between two judicial systems charged with the enforcement of a law binding on both. This, it bears recalling, is an important factor in the working of our federalism without needless friction.

Have the Georgia courts disrespected the law of the land in the judgment under review? Since Congress empowers State courts to entertain suits under the Federal Employers' Liability Act, a State cannot wilfully shut its courts to such cases. *Second Employers' Liability*

Cases, 223 U. S. 1. But the courts so empowered are creatures of the States, with such structures and functions as the States are free to devise and define. Congress has not imposed jurisdiction on State courts for claims under the Act "as against an otherwise valid excuse." *Douglas* v. *New York, New Haven & H. R. Co.,* 279 U. S. 377, 388. Again, if a State has dispensed with the jury in civil suits or has modified the common-law requirements for trial by jury, a plaintiff must take the jury system as he finds it if he chooses to bring his suit under the Federal Employers' Liability Act in a court of that State. *Minneapolis & St. L. R. Co.* v. *Bombolis,* 241 U. S. 211. After all, the Federal courts are always available.

So also, States have varying systems of pleading and practice. One State may cherish formalities more than another, one State may be more responsive than another to procedural reforms. If a litigant chooses to enforce a Federal right in a State court, he cannot be heard to object if he is treated exactly as are plaintiffs who press like claims arising under State law with regard to the form in which the claim must be stated—the particularity, for instance, with which a cause of action must be described. Federal law, though invoked in a State court, delimits the Federal claim—defines what gives a right to recovery and what goes to prove it. But the form in which the claim must be stated need not be different from what the State exacts in the enforcement of like obligations created by it, so long as such a requirement does not add to, or diminish, the right as defined by Federal law, nor burden the realization of this right in the actualities of litigation.

Of course "this Court is not concluded" by the view of a State court regarding the sufficiency of allegations of a Federal right of action or defense. This merely means that a State court cannot defeat the substance of a Federal

claim by denial of it. Nor can a State do so under the guise of professing merely to prescribe how the claim should be formulated. *American R. Express Co.* v. *Levee,* 263 U. S. 19, 21.

The crucial question for this Court is whether the Georgia courts have merely enforced a local requirement of pleading, however finicky, applicable to all such litigation in Georgia without qualifying the basis of recovery under the Federal Employers' Liability Act or weighting the scales against the plaintiff. Compare *Norfolk Southern R. Co.* v. *Ferebee,* 238 U. S. 269, with *Central Vermont R. Co.* v. *White,* 238 U. S. 507. Georgia may adhere to its requirements of pleading, but it may not put "unreasonable obstacles in the way" of a plaintiff who seeks its courts to obtain what the Federal Act gives him. *Davis* v. *Wechsler,* 263 U. S. 22, 25.

These decisive differences are usually conveyed by the terms "procedure" and "substance." The terms are not meaningless even though they do not have fixed undeviating meanings. They derive content from the functions they serve here in precisely the same way in which we have applied them in reverse situations—when confronted with the problem whether the Federal courts respected the substance of State-created rights, as required by the rule in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, or impaired them by professing merely to enforce them by the mode in which the Federal courts do business. Review on this aspect of State court judgments in Federal Employers' Liability cases presents essentially the same kind of problem as that with which this Court dealt in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, applied at the last Term in *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U. S. 530, and *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 555. Congress has authorized State courts to enforce Federal rights, and Federal courts State-created

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rights. Neither system of courts can impair these respective rights, but both may have their own requirements for stating claims (pleading) and conducting litigation (practice).

In the light of these controlling considerations, I cannot find that the Court of Appeals of Georgia has either sought to evade the law of the United States or did so unwittingly. That court showed full awareness of the nature and scope of the rights and obligations arising under the Federal Employers' Liability Act as laid down in this Court's decisions.[1] It fully recognized that the right under the Act is founded on negligence by the carrier in whole or in part, that "assumption of risk" must rigorously be excluded, that contributory negligence does not defeat the action but merely bears on damages. Nor is it claimed that by the use of presumptions or otherwise the State court placed on the plaintiff a burden of proof exceeding that of the Act. All that the Georgia court did was conscientiously to apply its understanding of what is necessary to set forth a claim of negligence according to the local requirement of particularity. Concretely it ruled that "The mere presence of a large clinker in a railroad yard can not be said to constitute an act of negligence." For all that appears, the Georgia court said in effect, the clinker had been placed there under such circumstances that responsibility could not be charged against the defendant. On this and other assumptions not met by plaintiff's complaint, the court did not find in the phraseology used in the complaint that the de-

[1] Indeed, the history of Georgia legislation and adjudication indicates that long before there was a Federal Employers' Liability Act that State was humane and not harsh in allowing recovery to railroad employees for injuries caused by the negligence of the carrier. Ga. Laws 1855, p. 155; *Augusta & S. R. Co.* v. *McElmurry,* 24 Ga. 75; Dodd, Administration of Workmen's Compensation 13–14 (1936).

fendant was chargeable with neglect for the presence of the offending clinker in a yard operated by itself as well as another carrier. I would not so read the complaint. But this does not preclude the Georgia court from taking a more constrained view. By so doing it has not contracted rights under the Federal Act nor hobbled the plaintiff in getting a judgment to which he may be entitled.

It is not credible that the Georgia court would be found wanting had it stated that under Georgia rules, as a matter of pleading, it was necessary to state in so many words that the presence of the particular clinker was due to the defendant's negligence, and to set forth the detailed circumstances that made the defendant responsible, although the range of inference open to a jury was not thereby affected. This is what that court's decision says in effect in applying the stiff Georgia doctrine of construing a complaint most strongly against the pleader. It is not a denial of a Federal right for Georgia to reflect something of the pernicketiness with which seventeenth-century common law read a pleading. Had the Georgia court given leave to amend in order to satisfy elegancies of pleading, the case would of course not be here. With full knowledge of the niceties of pleading required by Georgia the plaintiff had that opportunity. Georgia Code § 81–1301 (1933).[2] He chose to stand on his complaint against a general demurrer. If Georgia thereafter authorizes dismissal of the complaint, the State does not thereby collide with Federal law.

I would affirm the judgment.

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[2] See also *Wells* v. *Butler's Builders' Supply Co.*, 128 Ga. 37, 40, 57 S. E. 55, 57; *Cahoon* v. *Wills*, 179 Ga. 195, 175 S. E. 563; Note, 106 A. L. R. 570, 574 (1937); Davis and Shulman, Georgia Practice and Procedure § 96 (1948).

MANUFACTURERS TRUST CO., TRUSTEE, *v.* BECKER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 55. Argued October 20, 1949.—Decided November 21, 1949.

In an arrangement proceeding instituted by a corporate debtor under Chapter XI of the Bankruptcy Act, an indenture trustee objected to the allowance of claims equal to the principal amount of debentures acquired at a discount, while the debtor was insolvent, by respondents, who were close relatives and an office associate of the debtor's directors. The referee found, in effect, that there was no bad faith or unfair dealing, and that, during the period of the purchases, respondents' conduct with reference to the affairs of the debtor was to its material benefit. The referee dismissed the objections, and both the District Court and the Court of Appeals affirmed. *Held:* On the record in this case, equitable considerations do not require that respondents' claims be limited to the cost of the debentures plus interest. Pp. 305–315.

(a) The two respondents who were close relatives of the directors purchased all their debentures while the debtor was a going concern (though technically insolvent); and, even if their claims be viewed as claims of directors, the probability that an actual conflict of interests arose from their purchases is not great enough to justify the exercise of equity jurisdiction to limit their claims to the cost of the debentures plus interest. Pp. 309–313.

(b) The third respondent did purchase a small portion of his debentures after the debtor ceased to be a going concern; but he was merely an office associate and friend of the directors, he had begun to buy debentures some months before their election, there was nothing to indicate that his purchases after they became directors were influenced by advice from them, they had no interest in his holdings, and consideration of his claim as that of a director is precluded. Pp. 314–315.

173 F. 2d 944, affirmed.

In a proceeding under Chapter XI of the Bankruptcy Act, the referee's dismissal of objections to the allowance of certain claims was affirmed by the District Court (80

F. Supp. 822) and the Court of Appeals (173 F. 2d 944). This Court granted certiorari. 337 U. S. 923. *Affirmed*, p. 315.

Edward K. Hanlon argued the cause and filed a brief for petitioner.

David W. Kahn argued the cause and filed a brief for respondents.

Solicitor General Perlman, Roger S. Foster, David Ferber and *W. Victor Rodin* filed a brief for the Securities & Exchange Commission, as *amicus curiae*, urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

This proceeding in bankruptcy is on objections to the allowance of claims equal to the principal amount of bonds of the debtor acquired at a discount during its insolvency by close relatives and an office associate of directors of debtor. Petitioner's objection that equitable considerations require limitation of the claims was dismissed by the referee, and the District Court affirmed. 80 F. Supp. 822. Following affirmance by a divided Court of Appeals for the Second Circuit, 173 F. 2d 944, we granted certiorari because the issue presented has importance in the administration of the arrangement and corporate reorganization provisions of the Bankruptcy Act. 337 U. S. 923.

On January 8, 1946, Calton Crescent, Inc., sold its only property, an apartment house located in New Rochelle, New York, for $300,000 pursuant to a contract entered into in October 1945. Being unable to discharge in full its obligations under debenture bonds maturing in 1953, outstanding in principal amount of $254,450, debtor filed in May 1946, a petition under Ch. XI of the Bankruptcy Act, 11 U. S. C. § 701 *et seq.* Under the plan of arrangement, authorizing a dividend of 43.61% of the principal

amount of the bonds, respondents Regine Becker, Emily K. Becker, and Walter A. Fribourg were to receive an aggregate dividend of $64,237.53 on allowance of claims based on respective individual holdings of debentures which total $147,300 in principal sum but were acquired at a total cost of $10,195.43.[1] Petitioner, Manufacturers Trust Company, appearing individually as creditor for fees and disbursements due it as indenture trustee and also as original trustee under said indenture, objected to allowance of respondents' claims as filed, on the ground that the circumstances of respondents' acquisitions require limitation of their claims to the cost of the debentures plus interest.

The circumstances pertinent to our consideration of petitioner's objections are as follows: The debtor was organized in 1933 to take title to the apartment property pursuant to a plan of reorganization. By January 1942 debtor had defaulted under the terms of the first mortgage and was operating with a deficit; at no time in the previous several years had its debentures been selling on the market at more than 8% of face value.

While debtor was then considering a sale of the property for $220,000, a suit to enjoin the sale was brought by Sanford Becker, son of respondent Regine Becker and husband of respondent Emily Becker.[2] Thereafter he proposed to arrange a loan on second mortgage to debtor of $15,000 to pay off the arrearages on the first mortgage,

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[1] The amount and cost of the respective holdings of the respondents, insofar as objected to, are as follows:

	Principal Amount	*Cost*
Regine Becker	$44,500	$3060.63
Emily K. Becker	52,800	5010.00
Walter A. Fribourg	50,000	2124.80

[2] Sanford Becker and respondent Fribourg first became interested in the affairs of debtor in September 1941. Soon thereafter each

all share and debenture holders being invited to participate. In April 1942 debtor accepted the offer, but none of its share or debenture holders elected to participate other than respondent Fribourg, who had desk room in the offices of Sanford Becker and his brother Norman Becker and was a long-time friend of the former. The loan was made by respondents Regine Becker, Emily Becker, and Fribourg. The second mortgage thus created was in default by the end of 1942, and in 1943 respondents took an assignment of rents but did not foreclose; nor was there change in management of the property. The second mortgage and interest were paid upon sale of the property in 1946. In addition to the second mortgage, sums aggregating $7,921.63 were advanced by respondents to pay taxes; this amount was repaid without interest in 1944 and 1945. Pursuant to provisions of the loan agreement in 1942, Sanford and Norman Becker were made directors of debtor, and when the remaining three directors resigned in 1944, the vacancies were filled by nominees of the Becker brothers.

The referee found that from early 1942 the market value of the property of debtor was insufficient to pay its debts. However, the record shows a tax valuation during the period of only slightly less than the outstanding indebtedness.[3] And although the debtor's operating account frequently ran in arrears, it revealed a surplus in

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purchased, independently, debentures of debtor of the face value of $5,000. No contest is made of these purchases.

It appears that transactions in the debentures included the transfer of capital shares of the debtor which had no market apart from the debentures.

[3] The major items of indebtedness consisted of (1) the first mortgage on the apartment building in original principal amount of $175,000, which had been reduced by 1946 to $154,000, of which reduction $7,875 had been paid since 1943; (2) the second mortgage

1945. Prior to disposing of its property debtor was at all times a going concern.[4]

The debentures on which respondents claim were acquired, at prices varying from 3% to 14% of face value, after the Becker brothers became directors in 1942.[5] Sanford Becker did not buy additional debentures after becoming a director. Norman Becker never owned any interest whatever in the debtor. Although neither of the Becker directors was interested in any purchase of the respondents, the debentures of Regine and Emily Becker were purchased through the agency of the Becker brothers and in the latter's judgment. The debentures of Regine Becker were purchased from an over-the-counter securities broker. Those of Emily Becker were acquired in part from the same dealer, in part from an estate whose attorneys were fully informed as to debtor's financial affairs, and in part from a Christian Association represented by a member of its investment committee who was fully advised as to the condition of debtor.

Some of Fribourg's debentures were bought from dealers in the over-the-counter market; others were acquired through an agent from the president and vice president of debtor when they withdrew from its management in 1944, and from other holders after the retiring president insisted that the offer made to him by Fribourg's agent be extended to all holders and be accompanied by

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and tax advances of the respondents totalling some $22,000, and (3) the debentures of $254,450, on which, however, interest was payable only if earned. The tax valuation was $421,630.

[4] The District Court's characterization of debtor as a going concern was not upset by the Court of Appeals and is accepted here.

[5] Regine Becker began purchases on February 10, 1944, and continued through August 30, 1945. The purchases of Emily Becker were made between May 24, 1944, and February 5, 1945. In addition to the purchases referred to in note 2, *supra*, Fribourg made purchases through June 4, 1946.

a statement of the president's intention to accept. Fribourg was in the market for speculative securities and purchased the debentures as a "gamble," being influenced by the tax valuation of the apartment building.

All of respondents' debentures, with the exception of $2,000 in face value purchased by Fribourg from a dealer, were acquired in advance of the contract for sale of the apartment property and the filing of debtor's petition for arrangement.[6]

It was the referee's finding, left undisturbed by both courts below, that respondents' purchases were without overreaching or failure to disclose any material fact to the selling bondholders. Petitioner does not here contend that respondents' claims should be limited because of conduct by the Becker directors or by respondents amounting to bad faith or abuse of fiduciary advantage. Nor does petitioner contend that respondents' bondholdings influenced the conduct of corporate affairs to the injury of the corporation or other creditors. Indeed, the referee found that the purchases were not unfair to debtor, that at the time of respondents' purchases debtor was not in the field to settle its indebtedness on the debentures, and that the assistance rendered to debtor by respondents materially aided in its grave financial situation. Moreover, the findings indicate that the most generous suggestion of an offer for the apartment building after the Beckers became directors and prior to the sale was at a figure substantially less than the sale price.

Petitioner urges broadly that directors are precluded from profiting by the purchase of claims against an in-

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[6] The latest purchase by a respondent clearly prior to the contract for sale was by Regine Becker on August 30 preceding the contract in October 1945. Fribourg apparently acquired $1,500 of debentures after the contract of sale and an additional $500 after the filing of debtor's petition.

solvent corporation. And, it contends, if directors may claim only the cost of debt securities acquired at a discount during a debtor's insolvency, those related as respondents are to the Becker directors should not be permitted to do more. Thus we view respondents' claims initially as if they were claims of directors.

This Court has repeatedly insisted on good faith and fair dealing on the part of corporate fiduciaries. It is especially clear, when claims in bankruptcy accrue to the benefit of a corporate officer or director, that the court must reject any claim that would not be fair and equitable to other creditors. *Pepper* v. *Litton*, 308 U. S. 295, 308–309 (1939).[7]

Claims of a corporate officer or director arising out of transactions with the corporation have been enforced when good faith and fairness were found. *Sanford Fork & Tool Co.* v. *Howe, Brown & Co.*, 157 U. S. 312 (1895); cf. *Manufacturing Co.* v. *Bradley*, 105 U. S. 175 (1882); see *Richardson's Ex'r* v. *Green*, 133 U. S. 30, 43 (1890); *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 589–591 (1876). Likewise a standard of good faith and fair dealing has been found applicable, where not superseded by a differing legislative or administrative rule, to purchases by directors of corporate shares, in the over-the-counter market, at less than book value on conversion under a plan of public utility reorganization. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943); cf. *id.*, 332 U. S. 194 (1947). In the first *Chen-*

[7] Since the power of disallowance of claims, conferred on the bankruptcy court by § 2 of the Act, 30 Stat. 545, 11 U. S. C. § 11, embraces the rejection of claims "in whole or in part, according to the equities of the case," *Pepper* v. *Litton*, 308 U. S. 295, 304–305 (1939), the court may undoubtedly require limitation of the amount of claims in view of equitable considerations. Cf. Bankruptcy Act, § 212, 52 Stat. 895, 11 U. S. C. § 612.

ery decision it was declared that equity has not imposed "upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation's stock." 318 U. S. at 88.

When the transactions underlying respondents' claims here are drawn alongside a good faith standard of fiduciary obligation, they appear unobjectionable. There is no component of unfair dealing or bad faith.[8] The findings negative any misrepresentation or deception, any utilization of inside knowledge or strategic position, or any rivalry with the corporation.[9] During the period of the purchases the conduct of the Becker directors and of respondents with reference to the affairs of the debtor was to its substantial benefit and to the advantage of the other debenture holders. And there is nothing to suggest that had the debentures been acquired by the Becker directors, they would have been unjustly enriched. Cf. *Securities and Exchange Commission* v. *Chenery Corporation, supra,* 318 U. S. at 86.

However, it is the contention of petitioner, and of the Securities and Exchange Commission as *amicus curiae,* that a standard of good faith and fair dealing is inadequate here. Relying particularly upon *Magruder* v. *Drury,* 235 U. S. 106 (1914), they invoke the principle that a trustee can make no profit from his trust. But *Magruder* v. *Drury* involved an express trust, and even during insolvency corporate assets "are not in any true

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[8] Cf. *In re The Van Sweringen Co.,* 119 F. 2d 231 (C. A. 6th Cir. 1941); *In re Norcor Mfg. Co.,* 109 F. 2d 407 (C. A. 7th Cir. 1940).

[9] Cf. *In re Jersey Materials Co.,* 50 F. Supp. 428 (D. N. J. 1943); *In re McCrory Stores Corp.,* 12 F. Supp. 267 (S. D. N. Y. 1935).

and complete sense trusts." *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 381–382 (1893).[10]

The Commission asserts, also, that if a director is free to acquire corporate obligations at a discount during insolvency and later enforce them in full, he will be subject to a possible conflict of interests inconsistent with his role as fiduciary to creditors of the corporation. Specifically it is argued that he may seek to postpone adjustment of claims or the institution of proceedings for relief, when such action would serve the interests of the corporation and its creditors, in order to continue his own purchase of corporate obligations at a market price lower than the valuation which he has made with the benefit of inside information.

This Court has recognized that equity must apply not only the doctrines of unjust enrichment when fiduciaries have yielded to the temptation of self-interest but also a standard of loyalty which will prevent a conflict of interests from arising. See *Weil* v. *Neary*, 278 U. S. 160, 173 (1929); cf. *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262, 268 (1941). In this case the consideration is whether or to what extent a conflict of interests would arise from a director's opportunity to purchase unmatured obligations of a corporation which, though technically insolvent, remains nevertheless a going concern. That "there is no such conflict in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations," *Seymour* v. *Spring Forest Cemetery Assn.*, 144 N. Y. 333, 344, 39 N. E. 365, 367 (1895),

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[10] Other holdings upon which the Commission relies, *Pepper* v. *Litton*, *supra*, note 7, and *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262 (1941), were considered in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 89 (1943), and there distinguished on grounds which are also dispositive here.

would seem true not only of solvent corporations.[11] Certainly the present record does not tend to establish that the opportunity for such purchases during insolvency would deprive a going corporation of the sound judgment of its officer. And in any event the potentiality of conflict must be weighed against the desirability of permitting reinforcement of the insolvent's position insofar as a director's acquisition of claims may help.[12] On this record the probability that an actual conflict of loyalties arose from the opportunity to purchase respondents' claims, while the debtor was a going concern, is not great enough to justify the exercise of equity jurisdiction which petitioner urges.[13]

Undoubtedly the possibilities of a conflict of interests for the purchasing director are intensified as the corporation becomes less a going concern and more a prospective subject of judicial relief. And if it is clear that a fiduciary may ordinarily purchase debt claims in fair transactions

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[11] Courts of equity, in defining the responsibility of officers of a corporation which is insolvent and yet a going concern, have frequently assigned greater importance to the corporation's vitality than to its insolvency. *E. g., Sanford Fork & Tool Co.* v. *Howe, Brown & Co.*, 157 U. S. 312 (1895); *White, Potter & Paige Mfg. Co.* v. *Henry B. Pettes Importing Co.*, 30 F. 864 (E. D. Mo. 1887).

[12] As respondents' purchases of debentures resulted in their securing control of debtor, see note 2, *supra*, the acquisitions arguably were a factor in preventing further financial deterioration of debtor. See also 62 Harv. L. Rev. 1391, 1392 (1949): Insolvency "is the very time when such purchases may be of most benefit to the corporation, since the credit of the corporation may be improved if it is known that directors are purchasing the corporation's securities; also it may be possible to forestall a bankruptcy petition while the corporation improves its financial position."

[13] Cf. *In the Matter of Wade Park Manor Corporation, Report of Special Master: Claims of Macklin et al.* (N. D. Ohio, 1949); see 3 Collier, Bankruptcy (14th ed.), p. 1784, 1948 Supp. p. 124.

during solvency of the corporation,[14] the lower federal courts seem equally agreed that he cannot purchase after judicial proceedings for the relief of a debtor are expected or have begun.[15] In this case, which lies between, it is unnecessary to determine precisely at what point the probability of conflict requires that equity declare ended the opportunity for profitable trading. It could hardly have been prior to the latest purchases of Regine and Emily Becker.[16]

The nature of the relation between Fribourg and the Becker directors makes immaterial that some of Fribourg's debentures may have been purchased after the corporation ceased to have the potency of a going concern, in expectation of or even after bankruptcy. Neither director had any indirect interest in Fribourg's holdings or served as his agent for purchase. Fribourg, moreover, had begun to acquire debentures some months before the negotiations leading to the election of the Beckers as directors of the debtor and, according to Fribourg's uncontradicted testimony, he began to purchase after looking over the apartment following Sanford Becker's mention of his own purchase. There is nothing in the record to indicate that Fribourg's purchases after the Beckers became directors were influenced by advice from them.

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[14] See *In re Philadelphia & Western R. Co.*, 64 F. Supp. 738, 739 (E. D. Pa. 1946); *Ripperger* v. *Allyn*, 25 F. Supp. 554, 555 (S. D. N. Y. 1938); *In re McCrory Stores Corp.*, note 9, *supra*, at 269.

[15] *Monroe* v. *Scofield*, 135 F. 2d 725 (C. A. 10th Cir. 1943); *In re Norcor Mfg. Co.*, note 8, *supra*; *In re Philadelphia & Western R. Co.*, note 14, *supra*; *In re Jersey Materials Co.*, note 9, *supra*; *In re Los Angeles Lumber Products Co.*, 46 F. Supp. 77 (S. D. Cal. 1941).

[16] Thus it becomes unnecessary to determine whether the relation of the Becker respondents to the directors was such as to require limitation of these respondents' claims if they would be disallowed in part as claims of directors.

Accordingly, any consideration of Fribourg's claim as that of a director is precluded.

A word of caution as to the scope of our decision is desirable in view of Judge Learned Hand's opinion below. He suggested that if in fact liquidation had been imminent at the time of respondents' purchases or if it were fairly demonstrable, as a matter of experience, that a director free from all potential self-interest would be more likely to initiate liquidation proceedings or to effect a debt settlement than one not wholly disinterested, a court of equity should explore such issues and not dismiss them out of hand. This decision is not meant to negative the relevance of these issues when raised by a proper record. We mention these matters because the Securities and Exchange Commission urges the importance of a decision in this case for questions that may well arise in proceedings under Ch. X. In such proceedings the Securities and Exchange Commission, acting as the statutory advisor to the court, would be within its rightful function in submitting to the court the light of its experience on dealings of the general kind disclosed in this case. Here we have proven facts in a particular case, and not a body of evidence submitted by the Securities and Exchange Commission, presumably informed by expert understanding.

The decision of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BURTON, with whom MR. JUSTICE BLACK joins, dissenting.

While corporate directors are not classed as express trustees, their obligations to their respective corporations are fiduciary in character. The more precarious the con-

dition of the corporation, the more it needs the undivided loyalty of its directors. Conflicts of interest must be resolved in its favor. An example of the need for doing so arises whenever, in the face of a prospect of the corporation's liquidation, some of its directors invest in its notes at a substantial discount. An inherent conflict of interests is thereby created. It may be necessary for them to choose between a corporate policy of reorganization which might be best for the corporation and one of liquidation which might yield more certain profits to them as noteholding directors. The fiduciary obligation of such directors to their corporation might thus conflict with their personal interests as noteholders. Their access to confidential corporate information emphasizes the good faith expected of them. The solution lies in making them accountable to their corporation for their profits from such an investment, much as a trustee must account to his beneficiaries for his profits from dealings in the subject matter of his trust. This result would spring wholly from the fiduciary nature of the obligations of directors to their corporation. It would need no proof of a breach of trust or of the actual overreaching of anyone.[1]

As long as a corporation enjoys the healthy status of a going concern, its directors generally may invest freely in its securities without accountability for their resulting

[1] Expression has been given to such a principle in many cases where there have also occurred breaches of trust of a nature so serious as not to require a final reliance upon the principle. See, *e. g.*, *In re The Van Sweringen Co.*, 119 F. 2d 231 (C. A. 6th Cir.); *In re Norcor Mfg. Co.*, 109 F. 2d 407 (C. A. 7th Cir.); *In re Philadelphia & Western R. Co.*, 64 F. Supp. 738 (E. D. Pa.); *In re Jersey Materials Co.*, 50 F. Supp. 428 (N. J.); *In re Los Angeles Lumber Products Co.*, 46 F. Supp. 77 (S. D. Cal.); *In re McCrory Stores Corp.*, 12 F. Supp. 267, 269 (S. D. N. Y.). See also, 3 Fletcher, Cyclopedia of Corporations § 869.1 (1947); 2 Remington on Bankruptcy § 975.01 (Supp. 1947).

profits. Their directorships should make them accountable for such profits when their personal interests as purchasers of securities may conflict with their obligations as directors.[2] A mere excess of a corporation's liabilities over its assets may not subject its directors to this accountability. Nevertheless, any evidence of the financial instability of their corporation obligates the directors to overcome whatever presumption of conflict of interests between their own and those of the corporation or of its creditors that such evidence presents.

In the instant case there should be a finding whether or not, at the time of the purchases of the debentures in question, there was a sufficient prospect of liquidation to bring the interests of directors as debenture purchasers into conflict with the interests of their corporation. If such a conflict is established, it then will be necessary to determine the extent, if any, to which the relatives and associates of such directors are to be identified with them.

I agree with the reasoning of the dissent below. 173 F. 2d 944, 951. Accordingly, I would reverse the judgment and remand the cause for further findings in accordance with this opinion.

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[2] Directors ordinarily may buy and sell the stock of their corporation, without accountability, except under special circumstances of unfairness in the particular transaction. 3 Fletcher, Cyclopedia of Corporations §§ 1171, 1174 (1947); Ballantine on Corporations § 80 (Rev. ed. 1946). Their purchase of stock increases their stake in the ultimate interests of the corporation they serve.

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KINGSLAND, COMMISSIONER OF PATENTS, *v.* DORSEY.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 53. Argued October 18–19, 1949.—Decided November 21, 1949.

Acting under R. S. § 487, 35 U. S. C. § 11, the Commissioner of Patents found, after hearings, that an attorney had been guilty of gross misconduct and entered an order barring him from practice before the Patent Office. *Held:* The findings were amply supported by the evidence, charges of unfairness in the hearings were wholly without support, and the order is sustained. Pp. 318–320.

84 U. S. App. D. C. 264, 173 F. 2d 405, reversed; 69 F. Supp. 788, affirmed.

The District Court affirmed an order of the Commissioner of Patents barring an attorney from practice before the Patent Office. 69 F. Supp. 788. The Court of Appeals reversed. 84 U. S. App. D. C. 264, 173 F. 2d 405. This Court granted certiorari. 337 U. S. 914. *Judgment of the Court of Appeals reversed and that of the District Court affirmed,* p. 320.

Robert L. Stern argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter* and *Roy C. Hackley.*

William E. Leahy argued the cause for respondent. With him on the brief were *William J. Hughes, Jr.* and *James F. Reilly.*

PER CURIAM.

Acting under the provisions of § 487 of the Revised Statutes (35 U. S. C. § 11), the Commissioner of Patents found after hearings that petitioner, an attorney, had been guilty of gross misconduct, and entered an order

barring him from practice before the United States Patent Office. Pursuant to authority granted by the same provisions, the District Court reviewed the Commissioner's order. Concluding that the hearings had been fairly conducted after due notice of charges and that there was substantial evidence to support the findings and action of the Commissioner, the District Court affirmed the order. 69 F. Supp. 788. The Court of Appeals reversed, 84 U. S. App. D. C. 264, 173 F. 2d 405. A majority of that court thought the notice of charges inadequate and the proceedings before the Commission unfair. It also held that the District Court had too narrowly restricted its scope of review in holding that substantial evidence was sufficient to support the findings. It apparently drew a distinction between the phrases "substantial evidence" and "substantial probative evidence." Measuring the findings by the latter phrase, it held that the Commissioner's findings were not supported by "substantial probative evidence." Judge Edgerton, dissenting, thought the hearings had been fairly conducted and "the result just." He agreed with the District Court that "substantial evidence" would have been sufficient but went on to say that he thought the "proof conclusive."

The statute under which the Commissioner acted represents congressional policy in an important field. It relates to the character and conduct of "persons, agents, or attorneys" who participate in proceedings to obtain patents. We agree with the following statement made by the Patent Office Committee on Enrollment and Disbarment that considered this case: "By reason of the nature of an application for patent, the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office . . . must rely upon their integrity and deal with them in a spirit of trust and confidence . . . ." It was the Commissioner, not the courts, that Congress

made primarily responsible for protecting the public from the evil consequences that might result if practitioners should betray their high trust. Having serious doubts as to whether the Court of Appeals acted properly here in nullifying the Commissioner's order, we granted certiorari.

After an examination of the record we are satisfied that the findings were amply supported whether the measure be "substantial evidence" or "substantial probative evidence." The charge of unfairness in the hearings is, we think, wholly without support.

Since the narration of evidence and discussion of the proceedings sufficiently appear in the District Court's opinion, reiteration here can serve no good purpose either for the parties or for the law.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, dissenting.

I agree that the privilege of practicing before the Patent Office is one that may and should be withdrawn for professional misconduct. In defense of his privilege it also is true that the lawyer may not demand that conclusiveness of proof or invoke all of the protections assured to an accused by the criminal process. But while society may expect that his judges will show him no favor because he has lived respectably for eighty years and devoted fifty-nine of them to practice of his profession without blemish, an accused lawyer may expect that he will not be condemned out of a capricious self-righteousness or denied the essentials of a fair hearing.

The court below thought Dorsey had not been fairly judged and indignantly reversed his disbarment. *Dorsey* v. *Kingsland,* 84 U. S. App. D. C. 264, 173 F. 2d 405. All questions of fact seem to have been resolved against Dorsey by his departmental triers, and I shall not here review all of those issues, even if on some of them Dorsey would seem entitled to prevail. Accepting the findings against him at their full face value, I think the disbarment order was properly set aside.

Back in 1926 the Hartford-Empire Co. conceived and executed a scheme to prepare and publish, over the signature of an apparently disinterested labor leader, an article to be published and then used in support of the company's pending patent application. Such a dissertation, entitled, "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor," was prepared. It purported to be authored by one Clarke, president of a glassworkers' union. It was published in a trade journal and then presented to the Patent Office as recognition by a "reluctant witness" of the success of the device under consideration. Several years later, involved in litigation testing the validity of its patent, Hartford-Empire took steps to suppress evidence of the real authorship of the Clarke essay. It made a gift of $8,000 to Clarke, who had told investigators employed by Hartford-Empire's adversary that he had written the article and would so testify if called upon as a witness. Ultimately, this Court reviewed the actions of Hartford-Empire and held that the sum total of acts attributable to it constituted a fraud on the Patent Office and the federal courts. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U. S. 238, reversing 137 F. 2d 764. See also *United States* v. *Hartford-Empire Co.,* 46 F. Supp. 541.

Dorsey was one of counsel for Hartford-Empire in the 1926 patent application and, shortly following our decision in *Hazel-Atlas, supra,* proceedings to suspend or ex-

clude him from further practice before the Patent Office were commenced under 35 U. S. C. § 11. Identical but separate proceedings were instituted against three other members of the patent bar involved in the transactions. All were disbarred. Only the *Dorsey* case is here.

Dorsey was charged with gross misconduct in that, as particularized in the notice which instituted the proceeding, he ". . . participated in the preparation of [the Clarke] article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application . . . ."

A view of the facts least favorable to Dorsey indicates that he inspected and criticized a few details of an early draft of the Clarke article and that later, with knowledge that it had been prepared by a Hartford-Empire employee, he submitted it to the Patent Office as being what on its face it purported to be. This is the long and the short of the case against Dorsey. The case against Hartford-Empire, however, included much in which Dorsey is not shown to have had even a consenting part. In two respects only are his actions urged to be wrongdoing: first, in that he deceived the Patent Office as to the real author, and, second (not charged in the notice but advanced here), that Dorsey represented it as the work of a "reluctant witness."

While it is not decisive of the narrow issue of deception pressed against Dorsey, it should be noted as showing how narrow that issue really is, that it includes no claim that any statement in the Clarke article is false or misleading in any respect whatsoever. It stated facts truthfully, facts which a patent lawyer was entitled to bring to the attention of the Patent Office in any manner per-

mitted by its practice. One might expect that the Patent Office would have required facts on which it issued a patent to be proved by affidavits whose truthfulness is encouraged, if not assured, by sanctions against perjury; but it was content to accept unsworn publications for its purposes. The worst that can be said of Dorsey is that he took advantage of this loose practice to use a trade journal article as evidence, without disclosing that it was ghost-written for the ostensible author.

Let us suppose the Patent Office had exacted more lawyerly standards of proof and had required such information to be laid before it in affidavit form. Clarke, let us say, was prevailed upon to make a deposition. Would it be deceit if the lawyer drafted every word of the affidavit, though it purported to be Clarke's testimony? I suppose that the practice is almost universal that the lawyer ascertains to what facts the witness can testify and puts them in presentable form and suitable words, and that the witness adopts the document as his testimony, with any correction necessary to convey his story. Nothing on the face of the usual affidavit discloses the fact that the composition is that of the attorney; on the contrary, it generally recites that it is the witness who "deposes and says . . . ." Is a different standard to be applied to a trade journal article intended and accepted to serve the same end?

I should suppose that, so far as the law is concerned, one may as effectively father statements by adoption as by conception and that sincerely subscribing to what another has written for him does not constitute legal deceit or grounds for disbarment, impeachment or other penalty. And in this case, not only is there no claim that the Clarke article contained one false statement, but there is no denial that, whoever was the scribe, Clarke believed and knowingly adopted as his own every word of it.

I should not like to be second to anyone on this Court in condemning the custom of putting up decoy authors to impress the guileless, a custom which as the court below cruelly pointed out flourishes even in official circles in Washington. Nor do I contend that Dorsey's special adaptation of the prevailing custom comports with the highest candor. Ghost-writing has debased the intellectual currency in circulation here and is a type of counterfeiting which invites no defense. Perhaps this Court renders a public service in treating phantom authors and ghost-writers as legal frauds and disguised authorship as a deception. But has any man before Dorsey ever been disciplined or even reprimanded for it? And will any be hereafter?

It is added, though as something of an afterthought, that Dorsey in his brief to the Patent Office characterized Clarke as a "reluctant witness." I had supposed that such adjectives were in the nature of argument or, at most, of conclusion rather than representation or warranty. The arsenal of every advocate holds two bundles of adjectives for witnesses—such ones as "reluctant," "unbiased," "disinterested," and "honest" are reserved for his own; others, such as "partisan," "eager," "interested," "hostile," and even "perjured," for those of his adversary. I have the greatest difficulty believing that a mischoice among these adjectives has deceived anyone fit to decide facts, or that in any case other than this it would subject the advocate to disbarment. But if wrong in this standard, I should think the use of "reluctant" as applied to Clarke was justified. I should not expect a union president to be other than reluctant to point out the advantages of automatic machinery which tends to throw his membership out of employment. At least I hope we have not come to the time when to urge this inference is even a makeweight in disbarment proceedings.

If, however, a lawyer is to be called upon to be the first example of condemnation for an offense so tenuous, vague and novel, the least courts should require is that the case against him be clearly proved. I shall give but two of several reasons why I think that standard was not met in this case.

First, the Patent Office committee, convened to hear the charges against Dorsey, approached its duty upon the premise that this Court's *Hazel-Atlas* decision established not only Hartford-Empire's guilt but also Dorsey's, unless he should clear his name. The records from that case and from *United States* v. *Hartford-Empire Co., supra,* not only were introduced against Dorsey, who was neither a party nor of counsel in either, but were the sole evidence to support the direct case against him. The committee's recommendation was apparently based upon its conclusion that he failed in the imposed task of proving his innocence. I think this was error of a serious kind.

It should be remembered that our conclusion in that case was reached upon the total effect of many events participated in by many persons whose acts were attributable to Hartford-Empire as their principal. A considerable part was not attributable to Dorsey. The most important and prejudicial of these circumstances which incriminate Hartford-Empire, but not Dorsey, is involved in another error, which I think deprived the accused of a fair trial.

I think that Dorsey suffered prejudice again from receipt of evidence concerning Hartford-Empire's later payment to Clarke and the reliance upon that fact to find Dorsey guilty. This payment was not made as an inducement to sign the article and was made long after Dorsey's relationship to the case had ceased. The Government frankly concedes that there is no evidence it

was made with the approval or even knowledge of Dorsey. The District Court found, and the Court of Appeals affirmed its finding, that "There is nothing in the evidence that connects Dorsey with the payment of any money to Clarke." We are bound by these concurrent findings.

Nevertheless, evidence of this payment was received against Dorsey and was thrown in the scales against him in the decision. Referring to the payment of money to Clarke, the Patent Office committee report on which Dorsey was disbarred says:

> "Nearly six years elapsed after the article was filed in the Patent Office before other events, relevant to the conduct of these *respondents* with respect to it, occurred. These subsequent events cast their light backwardly on the activities of the *parties* during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of *respondents* at that time." (Italics supplied.)

Thus it is clear that Hartford-Empire's later corruption in trying to suppress evidence, which we properly considered as a factor in deciding its case, was the decisive factor in finding Dorsey guilty, though he admittedly had no part in it. Without this misapplication of evidence, nothing in the record explains or excuses the harsh judgment of disbarment. Even though courts lean backward to avoid suspicion of partiality to men of our own profession, they should not fear to protect a lawyer against loss of his right to practice on such a record as this.

PARKER ET AL. *v.* COUNTY OF LOS ANGELES ET AL.

NO. 49. CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.*

Argued November 8, 1949.—Decided December 5, 1949.

A state court dismissed actions by civil service employees for relief against enforcement of a "loyalty" program by a county, without considering whether disclosure of information sought by a prescribed affidavit would have penal consequences, and its decision left in doubt whether it had passed on the validity under the Fourteenth Amendment of sanctions (if there were any) for failure to execute the affidavit. By a subsequent order, not involved in the judgments now before this Court, the county explicitly adopted sanctions for failure to execute affidavits; and the validity of this latter order was attacked for the first time in litigation still pending in the state courts. Since this latter litigation may be decided in favor of the employees on grounds of state law, *held:* The constitutional questions raised in these cases are not ripe for adjudication, and the writs of certiorari heretofore granted are dismissed. Pp. 328–333.

88 Cal. App. 2d 481, 199 P. 2d 429, certiorari dismissed.

A state trial court dismissed suits by certain county employees for relief against a so-called "loyalty test" prescribed by the county's Board of Supervisors. The State District Court of Appeal affirmed. 88 Cal. App. 2d 481, 199 P. 2d 429. The State Supreme Court denied discretionary review. This Court granted certiorari. 337 U. S. 929. *Writs of certiorari dismissed,* p. 333.

John T. McTernan argued the cause for petitioners in No. 49. With him on the brief was *Lee Pressman.*

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*Together with No. 50, *Steiner* v. *County of Los Angeles et al.,* also on certiorari to the same court.

A. L. Wirin argued the cause for petitioner in No. 50. With him on the brief were *Fred Okrand, Edward J. Ennis, Osmond K. Fraenkel* and *Arthur Garfield Hays.*

Gerald G. Kelly argued the cause for respondents. With him on the brief was *Harold W. Kennedy.*

Briefs of *amici curiae* urging reversal were filed by *George Slaff* for the Los Angeles Area Council of the American Veterans Committee; *Loren Miller* for the National Lawyers Guild, Los Angeles and Hollywood Chapters; *Samuel A. Neuburger* for the Civil Rights Congress; and *Thomas R. Jones* for the Council on African Affairs, Inc.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In No. 49, twenty-five classified civil servants of the County of Los Angeles brought an action in the Superior Court of that County, and in No. 50, suit was brought by one such employee. The respective plaintiffs sought relief against enforcement by the County and its officials of what is colloquially known as a loyalty test, and they did so for themselves and "in a representative capacity . . . on behalf of 20,000 employees of Los Angeles County similarly situated."

The plaintiffs, petitioners here, alleged that on August 26, 1947, the Board of Supervisors of the County of Los Angeles adopted as part of its "Loyalty Check" program the requirement that all County employees execute a prescribed affidavit. It consisted of four parts, fully set forth in the Appendix. By Part A, each employee is required to support the Constitution of the United States, and the Constitution and laws of the State of California; by Part B, he forswears that since December 7, 1941, he has been a member of any organization advocating the

forcible overthrow of the Government of the United States or of the State of California or of the County of Los Angeles, that he now advocates such overthrow, or that he will in the future so advocate directly or through an organization; by Part C, he is required to list his aliases; and by Part D, he is asked to indicate whether he has ever been "a member of, or directly or indirectly supported or followed" any of an enumerated list of 145 organizations. Asserting fear of penalizing consequences from the loyalty program, and claiming that the law of California and the Constitution of the United States barred coercive measures by the County to secure obedience to the alleged affidavit requirement, petitioners brought these actions. Demurrers to the complaints were sustained by the Superior Court and its judgments were affirmed by the District Court of Appeal for the Second Appellate District. 88 Cal. App. 2d 481, 199 P. 2d 429. After the Supreme Court of California denied discretionary review we brought the case here because, on the showing then before us, serious questions seemed raised as to the scope of a State's power to safeguard its security with due regard for the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. 337 U. S. 929. In view, however, of the circumstances that became manifest after the cases came to argument, we are precluded from reaching these constitutional issues on their merits.

To begin with, the California decision under review does not tell us unambiguously what compulsion, if any, the loyalty order of August 26, 1947, carried. It is unequivocally clear that the lower court refused to decide whether an employee who discloses his so-called "subversive" activities or connections may for that reason be discharged. It is not clear, however, whether, as petitioners contend, the lower court meant to hold that the

Board of Supervisors may discharge an employee who refuses to file an affidavit.[1] This ambiguity renders so doubtful whether an issue under the United States Constitution is before us that at most we would exercise jurisdiction to obtain clarification by the State court. See *Honeyman* v. *Hanan,* 300 U. S. 14; *Minnesota* v. *National Tea Co.,* 309 U. S. 551; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511; *Herb* v. *Pitcairn,* 324 U. S. 117. But the circumstances which were called to our attention after the cases reached us leave no doubt that the issues which led us to bring them here are not ripe for constitutional adjudication. *American Wood Paper*

[1] Clearly enough some discharges or demotions of classified employees by the Board of Supervisors are not final. The division of authority between the Board and the County Civil Service Commission is thus formulated by the lower court:

"In case the appointing power wishes to discharge a civil service employee the reasons therefor must be given and, thereupon, if the employee so desires he is entitled to a hearing before the commission. If the commission finds that the reasons are not sufficient, the discharge is void despite anything the appointing power can do about it.

"From what has so far been said, it is self-evident that neither the board nor its agents can discharge a civil service employee for any cause that the civil service commission finds insufficient. Accordingly, if in the view of the board of supervisors, or its agents as the appointing power, a civil service employee should be discharged on the sole ground that the employee is 'subversive,' the discharge or attempt to discharge on that ground is of no effect if, on hearing, the commission holds otherwise.

. . . . . .

Whether the appointing power will or will not discharge employees as claimed by the plaintiffs, for causes of the character enumerated, and whether the civil service Commission will uphold such discharges, if any, on such causes, are not matters upon which this Court may speculate or adjudicate at this time. . . ." 88 Cal. App. 2d 481, 493, 497, 199 P. 2d 429, 436, 438–39. See Los Angeles County Charter, Art. IX, § 34 (13) in Cal. Laws 1913, p. 1495, as amended, Cal. Stat. 1939, p. 3147.

Co. v. *Heft,* 8 Wall. 333, 131 U. S. xcii; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360.

As of July 20, 1948, nearly a year after the original loyalty order, all but 104 of the 22,000 officers and employees of the County had executed the prescribed affidavit. On that day, these noncomplying employees were advised that the Board of Supervisors had adopted an order providing (1) that unless they had executed Parts A, B and C of the affidavit by July 26 they would be discharged, and (2) that unless they had executed Part D by that time they would be discharged "if and when the loyalty test litigation now pending is finally concluded with a determination that the County was justified in requiring from its employees the information embodied in Paragraph 'D.' "[2]

This order was the first explicit announcement of sanctions by the Board in furtherance of its loyalty program. By July 26 the entire affidavit had been executed by all but 45 employees. Of these, 29 had executed only Parts A, B and C. Sixteen stood their ground against any compliance. They invoked their administrative remedy of review before the Civil Service Commission which decided against them. On June 24 of this year these sixteen discharged employees sought a writ of mandate from the Superior Court of the County of Los Angeles to review the decision of the Civil Service Commission, with a prayer for reinstatement and back pay. We are advised that this litigation is now pending in the Superior Court. The petitioners here, except one in No. 49, signed Parts A, B and C, and that petitioner is a party in the case before the Superior Court.

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[2] The affidavit in the order of July 20, 1948, differed from the affidavit in the original order only in that Part B was elucidated to an extent not here relevant and a few organizations listed in Part D were omitted.

From this it appears that the California courts have before them for the first time since the inception of the loyalty program an order which expressly threatens sanctions. These sanctions are being challenged under State law as well as under the United States Constitution. For all we know the California courts may sustain these claims under local law.[3] The present cases are here from an intermediate State appellate court because the State Supreme Court did not deem the records before it to present issues deserving of its discretionary review. The explicit sanctions of the modified order may lead the Supreme Court of California to pass on them should the litigation now pending in the lower courts go against the contentions of these petitioners. It is relevant to note that when claims not unrelated to those now urged before us, but based on State law, have come before the Supreme Court of California that tribunal has not been insensitive to them. See *Communist Party* v. *Peek*, 20 Cal. 2d 536, 127 P. 2d 889; *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329. If their claims are recognized by the California courts, petitioners would of course have no basis for asserting denial of a Federal right. It will be time enough for the petitioners to urge denial of a Federal right after the State courts have definitively denied their claims under State law.

Due regard for our Federal system requires that this Court stay its hand until the opportunities afforded by State courts have exhausted claims of litigants under

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[3] Article IX, § 41 of the Los Angeles Charter provides: "No person in the classified service, or seeking admission thereto, shall be appointed, reduced or removed or in any way favored or discriminated against because of his political or religious opinions or affiliations." Cal. Laws 1913, p. 1496. Article I, §§ 1, 4, 9, 10, 16, 21 of the California Constitution contains safeguards against infringement of the rights at which petitioners claim the loyalty investigation strikes.

State law. This is not what is invidiously called a technical rule. The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken with knowledge of the events brought to light for the first time at the bar of this Court. Since the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision, all subsidiary questions fall. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 585; *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450; *C. I. O.* v. *McAdory*, 325 U. S. 472.

Dismissed.

MR. JUSTICE DOUGLAS took no part in the consideration or disposition of these cases.

APPENDIX.

The affidavit prescribed by the Board of Supervisors of the County of Los Angeles on August 26, 1947, as part of its "Loyalty Check" program is as follows:

OATH AND AFFIDAVIT

Department .....

A. OATH OF OFFICE OR EMPLOYMENT

I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and laws of the State of California, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well

and faithfully discharge the duties of the office or employment on which I am about to enter or am now engaged. So Help Me God.

B. Affidavit re Subversive Activity

I do further swear (or affirm) that I do not advocate, nor am I now a member, nor have I been since December 7, 1941, a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles, by force or violence, except those specified as follows: ..... and that during such time as I am an officer or employee of the County of Los Angeles, I will not advocate nor become a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles by force or violence.

C. Affidavit re Aliases

I do further swear (or affirm) that I have never used or been known by any names other than those listed as follows: .....

D. Membership in Organizations

I do further swear (or affirm) that I have never been a member of, or directly or indirectly supported or followed any of the hereinafter listed organizations, except those which I indicate by an X mark.

NAME	NAME
Abraham Lincoln Brigade.	After School Clubs.
Academic and Civil Rights Council of California.	Agitprop.
	American Artists Congress.

NAME

America for Americans.
American Comm. for a Free Indonesia.
American Comm. for Democracy and Intellectual Freedom.
American Comm. for Protection of the Foreign Born.
American Comm. to Save Refugees.
Americans Communications Assn.
American Communist Party.
American Council on Soviet Relations.
American Federation for Political Unity.
American Friends of the Chinese People.
American Guard.
American League Against War and Fascism.
American League for Peace and Democracy.
American League of Christian Women.
American Peace Mobilization.
American Russian Institute.
American Society for Technical Aid for Spain.
American Student Union.
American Veterans Comm.
American Writers Congress.
American Youth Congress.
American Writers School.
American Youth for Democracy.
Anti-Axis Comm.
Anti-Hearst Examiner.
Anti-Nazi League.
Anti-Nazi League of Hollywood.
Anti-ROTC Committee.
Arcos Limited.

NAME

Artist Front to Win the War.
Arts Advisory Council.
Authors League.
Ballila.
Bay Area Council Against Discrimination.
California Conference for Democratic Action.
California Labor School.
California Youth Legislature.
Centro Anti-Communists.
China Aid Council of American League for Peace and Democracy.
Citizens Committee for Better Education.
Citizens Comm. for Defense of Mexican-American Youth.
Citizens Comm. to Free Earl Browder.
Citizens Comm. to Support Labors Right.
Citizens No Foreign Wars Coalition.
Civil Rights Congress.
Civil Rights Council for Northern California.
Comintern.
Comm. for Boycott Against Japanese Aggression.
Comm. for Defense of Mexican-American Youth.
Comm. for Support of S. W. Garson.
Comm. Protesting Attacks Against the Abraham Lincoln Brigade.
Comm. to Defend America by Keeping Out of War.
Communist International.

NAME

Communist Party's Little Theatre.
Communist Workers School.
Communist Political Assn.
Conference for Democratic Action.
Consumers National Federation.
Contemporary Theatre.
Co-ordinating Commission to Lift Embargo (To Spain).
Council for Pan American Democracy.
Cultural and Professional Projects Assn.
Congress of Mexican and Spanish-Mexican Peoples of U. S.
Daily Worker.
Democratic Youth Federation.
Elizabeth Curley Flynn Club.
Elizalde Anti-Discrimination Comm.
Emergency Comm. to Aid Spain.
Emergency Trade Union Conference to Aid Spanish Democracy.
Ex Combattanti Society.
Farmer Labor Party.
Federation of Architects, Engineers, Chemists and Technicians.
Field Workers School.
First Congress of Mexican and Spanish-American Peoples of U. S.
Friends of Soviet Russia.
Friends of Soviet Union.
German-American Bund.
Greater New York Emergency Conference on Inalienable Rights.

NAME

Harry Bridges Defense Comm.
Hold the Price Line Comm.
Hollywood Anti Nazi League.
Hollywood Cultural Commission.
Hollywood Community Radio Group.
Hollywood Independent Citizens Comm. of Arts, Sciences and Professions.
Hollywood League for Democratic Action.
Hollywood Theatre Alliance.
Hollywood Writers Mobilization.
Humanist Society of Friends.
Independent Citizens Comm. of Arts, Sciences and Professions.
International Labor Defense.
International Red Aid.
International Workers Order.
Jewish Peoples Committee.
John Reed Clubs.
Joint Committee for Trade Union Rights.
Joint Anti-Fascists Refugee Committee.
League Against War and Fascism.
League for Democratic Action.
League for Peace and Democracy.
League for American Writers.
League for Struggle for Negro Rights.
League of Women Shoppers.
League to Save America First.
Los Angeles County Political Commission.
Los Angeles County Trade Union Commission.
Mooney Defense Commission.

NAME

Marine Cooks and Stewards Union.
Maritime Federation of the Pacific.
Mobilization for Democracy.
Motion Picture Cooperative Buyers Guild.
Motion Picture Democratic Committee.
National Citizens Political Action Committee.
National Committee to Abolish the Poll Tax.
National Council on Soviet American Friendship.
National Emergency Conference.
National Federation for Constitutional Liberties.
National Negro Women's Council.
National Negro Congress.
National Students League.
New Masses.
New Theatre League.

NAME

North American Commission to Aid Spanish Democracy.
Pen and Hammer Club.
Peoples Council of America.
Peoples Front.
Progressive Comm. to Rebuild the American Labor Party.
Refugee Scholarship and Peace Comm.
Second Annual California Model Legislature.
Simon J. Lubin Society.
Social Problems Club.
Spanish Relief Committee.
Student Rights Assn.
United Farmers League.
United Federal Workers.
Western Workers.
Workers Alliance.
World Committee Against War.
Workers School.
Young Communist League.
The Young Pioneers.

UNITED STATES *v.* YELLOW CAB CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 22. Argued November 14–15, 1949.—Decided December 5, 1949.

In a suit to restrain violations of §§ 1 and 2 of the Sherman Act through a conspiracy to restrain and monopolize the sale of taxicabs by control of the principal companies operating them in certain states, the trial court carefully weighed the evidence, found it insufficient to support the allegations of the complaint and entered judgment for defendants. *Held:* Judgment affirmed. Pp. 339–342.

(a) For triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions. *Labor Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656. P. 341.

(b) Rule 52, Federal Rules of Civil Procedure, applies to appeals by the Government as well as to those by other litigants. Pp. 341–342.

(c) Where the evidence would support a conclusion either way and the trial court has decided it to weigh more heavily for the defendants, such a choice between two permissible views of the weight of the evidence is not "clearly erroneous" within the meaning of Rule 52. P. 342.

80 F. Supp. 936, affirmed.

In a suit to enjoin alleged violations of §§ 1 and 2 of the Sherman Act, the District Court found that the evidence did not support the allegations of the complaint and entered judgment for defendants. 80 F. Supp. 936. On appeal to this Court, *affirmed,* p. 342.

Charles H. Weston argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, Joseph W. Bishop, Jr.* and *J. Roger Wollenberg.*

Jesse Climenko argued the cause for appellees. With him on the brief was *Harold S. Lynton.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This suit in equity, under §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, originally included three charges of violation: (1) conspiracy to restrain and monopolize transportation of interstate travelers by taxicab between Chicago railroad stations and their homes, offices and hotels; (2) conspiracy to eliminate competition for the business of transporting passengers between different Chicago railroad stations; and (3) conspiracy to restrain and monopolize the sale of taxicabs by control of the principal companies operating them in Chicago, New York, Pittsburgh and Minneapolis. On a previous appeal this Court held the first of the charges not to state a case within the statute, and that charge no longer concerns us. *United States* v. *Yellow Cab Co.*, 332 U. S. 218. The court below found that the Government failed to prove the second charge and no appeal is taken from that part of the judgment, so that charge has been eliminated. We have held that the residue of the complaint, embodying the third charge, alleges a cause of action within the statute, but only on the expressed assumption that the facts alleged are true, *United States* v. *Yellow Cab Company, supra,* at 224; but the trial court has found that the Government, at the trial, has failed on all the evidence to prove its case. 80 F. Supp. 936. The cause is before us by a direct appeal under the Expediting Act, 15 U. S. C. § 29, and not by an exercise of our discretionary jurisdiction.

The first question proposed by the Government is whether the evidence sustains the findings of fact by the District Court. This is the basic issue, and the Government raises no question of law that has an existence independent of it. This issue of fact does not arise upon the trial court's disregard or misunderstanding of some def-

inite and well-established fact. It extends to almost every detail of the decision, the Government saying that the trial court "ignored . . . substantially all of the facts which the Government deemed significant."

What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties to certain 1929 business transactions, whether corporate officers were then acting in personal or official capacities, what was the design and purpose and intent of those who carried out twenty-year-old transactions, and whether they had legitimate business motives or were intending to restrain trade of their competitors in car manufacture, such as General Motors, Ford, Chrysler and Packard.

These were the chief fact issues in a trial of three weeks' duration. The Government relied in large part on inferences from its 485 exhibits, introduced by nine witnesses. The defendants relied heavily on oral testimony to contradict those inferences. The record is before us in 1,674 closely-printed pages.

The Government suggests that the opinion of the trial court "seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the court." We see that it did indeed accept defendants' evidence and sustained defendants' view of the facts. But we are unable to discover the slightest justification for the accusation that it did so "uncritically." Also, it rejected the inferences the Government drew from its documents, but we find no justification for the statement that it "ignored" them. The judgment below is supported by an opinion, prepared with obvious care,

which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others.

Only last term we accepted the view then advanced by the Government that for triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions. We said, "We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact. . . ." *Labor Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656, 659.

Rule 52, Federal Rules of Civil Procedure, provides, among other things:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it,

even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous."

Judgment affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, with whom MR. JUSTICE REED concurs, dissenting.

The evidence showed here without dispute that a manufacturer of taxicabs through a series of stock purchases obtained 62% of the stock of a corporation which itself had large stock interests in local companies operating taxicabs. The man who was president, general manager, director, and dominant stockholder in the taxicab manufacturing company also held an important managerial position in the corporate network that carried on the business of the local taxicab operating companies. The findings of the District Court were that the affiliated ownership, management and control were not the result of any deliberate or calculated purpose of the manufacturing company to control the operating companies' purchases of taxicabs, and that no compulsion had been exercised to control such purchases. Consequently the trial court held that despite the integration of corporate management there was no violation of the Sherman Act. I think

that the trial court erred in holding that a formed intent to suppress competition is an indispensable element of violations of the Sherman Act.

In *United States* v. *Griffith,* 334 U. S. 100, 105, 106, we said:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. *United States* v. *Patten;* 226 U. S. 525, 543; *United States* v. *Masonite Corp.,* 316 U. S. 265, 275. To require a greater showing would cripple the Act. . . . [E]ven if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act."

Measured by this test the findings of the trial court here fail to support its legal conclusions that no violation of the Sherman Act had been proven. Since the trial court went on the assumption that subjective intent to suppress competition is an essential ingredient of Sherman law violations, it did not make specific findings as to whether the freedom of the taxicab companies to buy taxicabs from other manufacturers had been hobbled by the defendants' business arrangements, regardless of compulsion or intent to destroy competition. There was much evidence tending to show this hobbling of competition. I think that the allegations of the complaint were sufficiently broad to present this issue for adjudication by the court. Moreover, presentation of the issue was emphasized by the

fact that a large amount of evidence to prove successful accomplishment of monopoly or restraints of trade was admitted without any objection by the defendants based on variance from the pleadings. See Federal Rule of Civil Procedure 15 (b).

There is evidence in the record to the effect that as a result of the corporate arrangements here the manufacturing company obtained sufficient power to dictate the terms of purchases by the local companies; there is also evidence that those companies did thereafter limit their purchases of taxicabs almost exclusively to those sold by the manufacturing defendant. Moreover, the evidence shows that such taxicabs were in some instances bought by the local company at prices above those paid by other taxicab companies wholly free to buy taxicabs in a competitive market. This evidence, if accepted, would support a finding of illegal restraint of trade or monopoly under the *Griffith* rule. I think the cause should be remanded for the trial court to consider the evidence and make findings on this aspect of the case.

Syllabus.

COLE ET AL. *v.* ARKANSAS.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 62. Argued November 9, 1949.—Decided December 5, 1949.

Petitioners were convicted of violating § 2 of Act 193 of the Arkansas Acts of 1943, which makes it unlawful "for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, *or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage.*" The State Supreme Court affirmed the conviction, indicating in its opinion that as to one charged with violation of the italicized portion, the statute requires that the accused shall have aided the assemblage with the intention that force and violence would be used to prevent a person from working. *Held:*

1. Both the trial court and the State Supreme Court construed the statute as not authorizing a conviction for mere presence in an assemblage at which unplanned and unconcerted violence was precipitated by another, and there was no disparity between the instructions of the trial court and the opinion of the State Supreme Court in this respect. Pp. 347–352.

2. As applied to petitioners, the statute did not abridge the freedom of speech or of assembly guaranteed by the Federal Constitution. Pp. 352–354.

3. The Act is not unconstitutionally vague, and its application in this case did not violate due process of law. P. 354.

214 Ark. 387, 216 S. W. 2d 402, affirmed.

On the remand ordered by this Court in *Cole* v. *Arkansas,* 333 U. S. 196, the State Supreme Court again affirmed petitioners' conviction for violation of a state statute. 214 Ark. 387, 216 S. W. 2d 402. This Court granted certiorari. 337 U. S. 929. *Affirmed,* p. 354.

Thomas E. Harris argued the cause for petitioners. With him on the brief was *Arthur J. Goldberg.*

Jeff Duty, Assistant Attorney General of Arkansas, argued the cause for respondent. With him on the brief were *Ike Murry,* Attorney General, and *Wyatt Cleveland Holland,* Assistant Attorney General.

Mr. Justice Jackson delivered the opinion of the Court.

In December 1945, 112 of the 117 employees of an oil company, including petitioners, went out on strike. About five o'clock one afternoon, petitioners, with several other strikers, assembled near the plant's entrance. Although a picket line was nearby, these men were not a part of it, and there is no suggestion that their acts were attributable either to the regular pickets or to the union representing them. As the five working employees left the plant for the day, the petitioner Jones called out to one named Williams to "wait a minute, he wanted to talk to him." When Williams replied that "he didn't have time, he was on his way home and he would see him another day," petitioner Jones gave a signal and said, "Come on, boys." Petitioner Cole, who was carrying a stick, told one of the other departing employees "to go ahead on, that they wasn't after me." Another striker named Campbell then attacked Williams and was killed in the ensuing struggle. It was further testified that these petitioners and others had that morning discussed talking to the men who were working "and they agreed that if they didn't talk right, they were going to whip them." While some of this was contradicted, such is the version which the jury could have found from the evidence.

The present case has had a curiously involved history. Convicted in 1946 of a statutory offense for their participation in the foregoing, petitioners secured a reversal in the Supreme Court of Arkansas for errors in the trial. 210 Ark. 433, 196 S. W. 2d 582. Following the retrial,

petitioners' second conviction was affirmed, 211 Ark. 836, 202 S. W. 2d 770; and we granted certiorari and reversed on the ground that the affirmance below had been based upon a section of the statute other than that for violation of which these petitioners had been tried and convicted. *Cole* v. *Arkansas,* 333 U. S. 196.[1] On remand, the State Supreme Court has reconsidered the appeal and has again affirmed in an opinion sustaining the convictions under the section of the statute on which the prosecution was based. 214 Ark. 387, 216 S. W. 2d 402. Doubts as to whether the mandate in our earlier decision had been obeyed led us to grant certiorari. 337 U. S. 929.

It appears on the surface, at least, that the Supreme Court of Arkansas has attempted to comply with our mandate and has now placed its affirmance upon the same section of the statute as that upon which the trial court

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[1] Act 193, Acts of Arkansas 1943, provides in pertinent part:

"Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. . . .

"Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. . . ."

The Supreme Court of Arkansas had affirmed the petitioners' convictions on the basis of § 1 of the above statute, although, as we observed, both the information drawn against the petitioners and the charge to the jury referred in unmistakable terms to a violation, not of § 1, but of § 2. Accordingly we reversed, holding it a violation of due process for the appellate court to appraise and affirm petitioners' convictions on considerations other than those governing the case as it was tried and as the issues were determined in the trial court.

submitted the case to the jury. The objection to this affirmance is, however, much more subtle and far-reaching than that involved in our previous decision. There it was clear that the Arkansas Supreme Court's affirmance was based upon an entirely different statutory offense from that charged and under which the case was submitted to the jury. It is now claimed that, although they both dealt with the same section of the Act involved, the trial court and the appellate court adopted contrasting interpretations of that section, and that the result was a repetition of the earlier error.

In addition to this contention, that the previous error has been repeated, it is also claimed that the statute now involved violates the Federal Constitution in that it abridges freedom of speech and assembly, and that the charge and statute are too vague and indefinite to conform to due process. All three claims involve serious charges of error, and if any one can be supported, petitioners are entitled to prevail.

Section 2 of Act 193, Acts of Arkansas 1943, provides:

> "It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, *or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. . . .*" (Italics supplied.)

In the opinion under review, the Supreme Court of Arkansas has indicated that as to one charged with a violation of the italicized portion, the statute requires that the accused aid the assemblage with the intention that force and violence would be used to prevent a person

from working. Petitioners' quarrel, however, is not with this construction. Instead, petitioners contend that in the trial court, as the statute was construed and as the case was submitted to the jury, their convictions rested upon the theory that no more was required than mere presence in a group where unplanned and unconcerted violence was precipitated by another. The requirements of knowledge and intent, they claim, were "read into" the statute for the first time by the appellate court on review, and were absent in the trial court.

It thus becomes apparent that underlying each of the three contentions advanced on behalf of these petitioners is the basic premise that their case was submitted to the jury on the theory that nothing more was needed to convict them than mere presence at an assemblage where violence occurred without their participation, concert, or previous knowledge. This is the foundation, not only of the claim that the trial court and the appellate court adopted contrasting interpretations of the Act they are said to have violated, but also of the claim that application of that Act offends the fundamental rights of speech and assembly protected from state deprivation by the Fourteenth Amendment. Similarly the alleged difference between the trial court and the appellate court in rendering the Act is the basis of the argument that it is constitutionally invalid for vagueness, it being contended here that in this very case the Act has been demonstrated to be susceptible of at least two different interpretations in the Arkansas courts.

Did the trial court authorize the jury to convict for mere presence in an assemblage where unplanned and unintended violence occurred? This is the basis of the plea for reversal and we turn to the record to ascertain whether or not it is justified.

The information on which the petitioners were tried set forth that Campbell in concert with others had assembled

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at the plant where a labor dispute existed and by force and violence prevented Williams from engaging in a lawful vocation. It then charged that "The said Roy Cole [and] Louis Jones . . . did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas." [2]

As we have noted in *Cole* v. *Arkansas, supra,* 198, the language employed in the information is substantially identical with that of § 2 of the Arkansas Act.

In explaining the Act, which was read to the jury, the trial court said that it included two offenses, ". . . First, the concert of action between two or more persons resulting in the prevention of a person by means of force and violence from engaging in a lawful vocation. And, second, in promoting, encouraging or aiding of such unlawful assemblage by concert of action among the defendants as is charged in the information here. The latter offense is the one on trial in this case."

In his second instruction, the trial court charged that ". . . if you further believe beyond a reasonable doubt that the defendants wilfully, unlawfully and feloniously,

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[2] The entire information was as follows: "Comes Sam Robinson, Prosecuting Attorney within and for Pulaski County, Arkansas, and in the name, by the authority, and on behalf of the State of Arkansas information gives accusing Roy Cole, Louis Jones and Jessie Bean of the crime of felony, committed as follows to-wit: On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas."

which [while] acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you will convict the defendants as charged in the indictment."

Needless to say, the defendants presented no request for a charge that would construe the statute as unfavorable to themselves as they now contend it was construed. To the contrary, an opposite construction was embodied in the defendants' requests to charge, all of which, with minor variations, were granted save one which duplicated a charge earlier made by the court. The ninth instruction requested by the defendants and granted by the court, said: "The court instructs you that mere fact, if you find it to be a fact that the defendants, or either of them, were present at the time of an altercation between Campbell and Williams, such fact alone would not justify you in finding the defendants or either of them guilty."

But it is contended that some portions of the opinion of the Supreme Court of Arkansas apparently "read into" the statute the requirement that the accused "promoted, encouraged and aided the assemblage—which was unlawful because of its purpose and its accomplished results," and that it sustained the convictions upon a conclusion from the evidence that "the defendants participated, aided, encouraged and abetted in an agreement with others to the effect that the workers . . . would be whipped if they did not agree to quit work." Petitioners argue that this requirement of purpose and knowledge was supplied as an additional element by the appellate court, and that in so doing that court departed even further from the construction of the trial court. But the question was before the jury in almost the very language petitioners object to as originating in the State Supreme Court. "You are instructed," said the trial court in giving a charge requested by these petitioners, "that before the defendants, or either of them can be convicted in this

case, you must be convinced beyond a reasonable doubt that they promoted, encouraged, and aided in an unlawful assemblage at the plant of the Southern Cotton Oil Company, for the purpose of preventing Otha Williams from engaging in a lawful vocation."

We do not find any such disparity between the instructions and the opinion of the Supreme Court as is suggested. At most, the appellate court spelled out what is implicit in the instructions of the trial court, and both were agreed that the statute authorized no conviction for a mere presence in an assemblage at which unplanned and unconcerted violence was precipitated by another.

What we have already said disposes of the contention that this Act as applied to petitioners abridges freedom of assembly. For this argument, too, rests on the assumption that this Act penalizes for mere presence in a gathering where violence occurs. As we have pointed out, the statutory text does not so read, the charge of the trial court expressly negatived this construction at the defendants' own request, and they themselves have complained of the appellate court that it went even further in this direction.

Accordingly, we are not called upon to decide whether a state has power to incriminate by his mere presence an innocent member of a group when some individual without his encouragement or concert commits an act of violence. It will be time enough to review such a question as that when it is asked by one who occupies such a status. Evidently these petitioners, in the minds of the jury, at least, did not.[3] For, as we have seen, the case was submitted under a statutory construction

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[3] One witness, whom the jury was entitled to believe, testified as follows:

"Q. You say you were down at the tent that morning?

"A. Yes, sir.

"Q. When these defendants here, Louis Jones and the others, were

and charge which forbade conviction without belief that the petitioners aided the assemblage "for the purpose of preventing Otha Williams from engaging in a lawful vocation."

As defined by the Arkansas Supreme Court, an unlawful assembly, the aiding of which is prohibited, is ". . . one where persons acting in concert have assembled in an attempt to prevent by force or violence some other person from engaging in a lawful occupation."

Certainly the Act before us does not penalize the promotion, encouragement, or furtherance of peaceful assembly at or near any place where a labor dispute exists, nor does it infringe the right of expression of views in any labor dispute.

Quite another question is involved when one is convicted of promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence. Such an assemblage has been denominated unlawful by the Arkansas legislature, and it is no abridgment of free speech or assembly for the criminal sanctions of the state

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in a discussion and were talking about talking to the men that were working?

"A. Yes, sir.

"Q. And they agreed that if they didn't talk right, they were going to whip them?

"A. Yes, sir."

Facts demonstrating the consummation of this plan were given to the jury by the testimony of another witness. As the men not on strike were leaving the plant, petitioner Jones, according to the witness, called upon Williams ". . . to wait a minute, he wanted to talk to him, and Otha told him he didn't have time, he was on his way home and he would see him another day.

"Q. Did he do anything else?

"A. He gave a signal and said 'Come on, boys.' . . .

"Q. What happened after Louis Jones gave the signal and said 'Come on, boys'?

"A. They flew up like blackbirds and came fighting."

to fasten themselves upon one who has actively and consciously assisted therein.

Similarly we find no merit in petitioners' contention that the Arkansas statute is unconstitutionally vague, so that its application in this case violated due process of law. Here again the premise upon which the argument is presented to us is that the two Arkansas courts differed in construing the statute, and we are asked to conclude from this fact that the test of definiteness which criminal statutes must meet under the due process clause, *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 223, has not been met. Since we cannot assume that the two courts were at odds in their interpretation of the statute, we find it unnecessary to explore the question as to whether such discrepancy, if it existed, would constitute a basis for concluding that the constitutional standards have not been achieved. We think that § 2, Act 193, Acts of Arkansas 1943, fairly apprises men of ordinary intelligence that for two or more to assemble and by force or violence prevent or attempt to prevent another from engaging in any lawful vocation constitutes an unlawful assemblage, and that the promotion, encouragement or aiding thereof is unlawful.

Judgment affirmed.

Mr. Justice Douglas took no part in the consideration or decision of this case.

COLGATE-PALMOLIVE-PEET CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 47. Argued November 17, 1949.—Decided December 5, 1949.

An employer and a labor organization entered into a closed-shop agreement which was valid under the National Labor Relations Act and under state law. The agreement, which the employer had entered into in good faith, was of indefinite duration and had been in effect more than four years. Pursuant to the agreement, upon the demand of the labor organization and in good faith, the employer discharged certain employees whom the labor organization had expelled from membership on account of their activity in behalf of a rival labor organization. The National Labor Relations Board thereupon found that the employer had violated §§ 8 (1) and 8 (3) of the Act, and ordered the discharged employees restored to their former positions without loss of seniority and pay. *Held:* The order of the Board was not authorized by the Act and was not entitled to enforcement. Pp. 356–365.

(a) The application of the so-called *Rutland Court* doctrine, embodying a policy of the Labor Board, is rejected, since the Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. Pp. 362–364.

(b) *Wallace Corp.* v. *Labor Board*, 323 U. S. 248, distinguished. Pp. 364–365.

171 F. 2d 956, reversed.

An order of the National Labor Relations Board, 70 N. L. R. B. 1202, requiring petitioner to restore certain discharged employees to their former positions without loss of seniority and pay, was granted enforcement by the Court of Appeals. 171 F. 2d 956. This Court granted certiorari. 337 U. S. 913. *Reversed,* p. 365.

Ricardo J. Hecht argued the cause for petitioner. With him on the brief were *Philip S. Ehrlich* and *Bartley C. Crum.*

Ruth Weyand argued the cause for the National Labor Relations Board, respondent. With her on the brief were *Solicitor General Perlman, Robert N. Denham, David P. Findling, Marcel Mallet-Prevost* and *Bernard Dunau.*

Mathew O. Tobriner filed a brief for the International Chemical Workers Union, A. F. of L., respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

The question we have here is whether a closed-shop contract, entered into and performed in good faith, and valid in the state where made, protects an employer from a charge of unfair labor practices under the National Labor Relations Act.[1]

Petitioner was found by the National Labor Relations Board to have violated §§ 8 (1) and 8 (3) of the Act.[2] On petition for review and cross-petition of the Board for enforcement of its order, the Court of Appeals for the Ninth Circuit entered a decree enforcing the Board's order.[3] We granted certiorari limited to the question of the construction of § 8 (3) of the Act in relation to this case,[4] *i. e.,* to examine the applicability of the so-called *Rutland Court* doctrine,[5] here applied by the Board.

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[1] 49 Stat. 449 *et seq.*, 29 U. S. C. § 151 *et seq.*

[2] *Matter of Colgate-Palmolive-Peet Company*, 70 N. L. R. B. 1202.

[3] 171 F. 2d 956.

[4] 337 U. S. 913.

[5] *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040.

The doctrine has been approved in the Second,[6] Third,[7] and Ninth Circuits,[8] but disapproved in the Seventh Circuit.[9]

At the period of time in question in 1945, petitioner company was engaged in producing glycerin for war purposes. Petitioner has no record of antiunion or anti-organizational activities. Its employees were first organized and represented in 1936 by a union affiliated with the American Federation of Labor. In 1938 the International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, became the representative of petitioner's employees. On July 9, 1941, the C. I. O. entered into a collective bargaining contract with petitioner which contained a closed-shop provision in these words:

> "Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired thru the offices of the Union, provided that the Union shall be able to furnish competent workers for work required. In the event the union is unable to furnish competent workers, the Employer may hire from outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. The employees covered by this agreement shall be mem-

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[6] *Labor Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14; *Colonie Fibre Co.* v. *Labor Board*, 163 F. 2d 65; *Labor Board* v. *American White Cross Laboratories*, 160 F. 2d 75.

[7] *Labor Board* v. *Public Service Transport Co.*, 177 F. 2d 119.

[8] *Labor Board* v. *Colgate-Palmolive-Peet Co.*, 171 F. 2d 956; *Local 2880* v. *Labor Board*, 158 F. 2d 365, certiorari granted, 331 U. S. 798, certiorari dismissed on motion of petitioner, 332 U. S. 845.

[9] *Aluminum Co. v. Labor Board*, 159 F. 2d 523; *Lewis Meier & Co.* v. *Labor Board*, 21 L. R. R. M. 2093 (Nov. 1947).

bers in good standing of the Union and the Employer shall employ no workers other than members of the Union subject to conditions herein above prescribed. In the hiring of new help (for the warehouses), they shall be hired through the offices of the Warehouse Union, Local 1–6, I. L. W. U."

This contract was entered into in good faith by the parties and served as a foundation for amicable labor relations for over four years. It was of indefinite duration. On July 24, 1945, the C. I. O. and petitioner entered into a supplemental agreement that their contract of July 9, 1941, "shall remain in full force and effect" pending approval of certain agreed-upon items, other than the closed-shop provision, by the War Labor Board. In the instant proceedings, the closed-shop contract, as extended by the supplemental agreement, was found by the National Labor Relations Board to have been made in compliance with the proviso of § 8 (3) of the Act.[10]

On July 26, 1945, shortly after the making of the supplemental agreement, open agitation for a change of bargaining representative began. On July 31 an unauthorized strike occurred which was participated in by a

[10] "SEC. 8. It shall be an unfair labor practice for an employer—

. . . . . .

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, . . . or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made." 49 Stat. 452, 29 U. S. C. § 158 (3).

substantial majority of the employees and lasted two and one-half days, although the C. I. O. had pledged its membership not to strike during wartime. A group of employees formed an independent organization which later sought to affiliate with the A. F. of L. There was much propagandizing among the employees and warnings were issued by the C. I. O. that its members would be disciplined for rival union activity, and would if disciplined be discharged from their jobs under the closed-shop contract with petitioner.

Altogether some 37 employees were suspended and expelled by the C. I. O. for their activities in behalf of the A. F. of L. union during the fight between the two unions for control, and because of their participation in the strike contrary to C. I. O. policy. These suspended and expelled employees were discharged by petitioner, with the advice of counsel, upon demand by the C. I. O. The ground of the demand was that they were no longer "members in good standing" of the C. I. O. as required by the closed-shop contract. Petitioner knew, as the Board found, that the discharge of these employees was demanded by the C. I. O. because of their rival union activity.

On October 16 the C. I. O. won an election held by the Board to determine the bargaining representative of petitioner's employees, and the open hostilities were substantially concluded.[11]

Petitioner was charged with violation of § 8 (1) and § 8 (3) of the Act and found guilty thereof by the Board for having carried out the terms of the closed-shop con-

[11] This election was thereafter set aside by the Board, upon objections filed by the A. F. of L., on the ground that the employer's discharge of employees at the request of the C. I. O. prevented the result of the election from being truly representative of the employees' wishes.

tract at the request of the bargaining representative. The Board ordered petitioner to restore the employees discharged at the request of the C. I. O. to their former positions without loss of seniority and pay. It is this order which the Court of Appeals decreed should be enforced and that is here for review.

There is no question but that the discharges had the effect of interfering with the employees' right, given by § 7 of the Act, to self-organization and to collective bargaining through representatives of their own choosing. Nor is there any question but that the discharges had the effect of discriminating, contrary to the prohibition of § 8 (3), in the tenure of the employees. It is petitioner's contention that such interference and discrimination are taken out of the category of unfair labor practices where the employees are discharged in good faith, pursuant to an employer's obligations under a valid closed-shop contract entered into in good faith with the authorized representative of the employees, as permitted by the proviso contained in § 8 (3) of the Act.[12] The Board admits that petitioner's contention is supported by the proviso in § 8 (3) but says that a contract of indefinite duration such as the one in the instant case is subject to the doctrine of *Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040. In the *Rutland Court* case the Board determined that an employer is not permitted to discharge employees pursuant to a closed-shop contract, even though the contract is valid under the proviso to § 8 (3), when, to the employer's knowledge, the discharge is requested by the union for the purpose of eliminating employees who have sought to change bargaining representatives at a period when it is appropriate for the employees to seek a redetermination of representatives. The reason for this holding by the Board will be presently discussed. The

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[12] *Supra*, n. 10.

doctrine as applied to the facts in this case is stated in the Board's brief as follows:

> "The Board found the closed-shop agreement to have been validly entered into in conformity with the proviso to Section 8 (3) of the Act. The Board concluded, however, that, by virtue of the indefinite term of the contract, which had run for more than four years, the employees undertook to oust the C. I. O. as their bargaining representative at a period during which it was appropriate to seek a redetermination of representatives."

The Board contends that therefore the contract no longer protected petitioner.

We take it from this conclusion of the Board that there is no dispute as to the validity of the closed-shop contract as far as the Act is concerned. In *Algoma P. & V. Co.* v. *Wisconsin Empl. Rel. Bd.*, 336 U. S. 301, it was held that nothing in the Act precludes a state from prohibiting closed-shop contracts in whole or in part. We therefore also look to the law of the state where the closed-shop contract was made, here California, to determine its validity. We think it is clear, and do not understand the Board to contend otherwise, that the closed-shop contract was valid under California law. *Shafer* v. *Registered Pharmacists Union Local 1172,* 16 Cal. 2d 379, 106 P. 2d 403; *Park & Tilford Import Corp.* v. *International Brotherhood of Teamsters, Etc., Local 848,* 27 Cal. 2d 599, 165 P. 2d 891; *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329. In the *Marinship* case, *supra,* at 736, the California Supreme Court explicitly recognized that a union may expel persons who "have interests inimical to the union" because of "the right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union." See also *Davis* v. *Int. Alliance of Stage Employees,* 60 Cal. App. 2d 713, 715, 141 P. 2d 486, 487–488, where it is stated that

under California law, "An organization has the natural right of self preservation, and may with propriety expel members who show their disloyalty by joining a rival organization." The contract was valid under the Act and under state law.

The claimed impotency of the contract as a defense here rests not upon any provision of the Act of Congress or of state law or the terms of the contract, but upon a policy declared by the Board. That policy has for its avowed purpose the solution of what the Board conceives to be an anomalous situation, in that § 7 guarantees employees the right to select freely their representative for collective bargaining, while the proviso to § 8 (3) permits a closed-shop contract with inherent possibilities for invasion of the right guaranteed by § 7. The solution arrived at in the *Rutland Court* case, and urged here, is that the Board may not give full effect to the proviso of § 8 (3) because to do so would permit circumvention of § 7. We turn to this contention.

One of the oldest techniques in the art of collective bargaining is the closed shop.[13] It protects the integrity of the union and provides stability to labor relations. To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.[14] Congress knew that a closed shop would interfere with freedom of employees to organize in another union

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[13] See Peterson, American Labor Unions, p. 1 (1945). Rev. Jerome L. Toner in The Closed Shop in the American Labor Movement, published under auspices of The Catholic University of America, Studies in Economics, vol. 5, 1941, traces the principle of the closed shop to the English guild system, the forerunner of the American union movement, p. 16 *et seq.* In America the desire of workers for closed-shop conditions antedates the American Revolution and even unionism. *Id.* at 22, 58 *et seq.*

[14] 49 Stat. 449, 29 U. S. C. § 151; S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935); H. R. Rep. Nos. 969, 972, 74th Cong., 1st Sess. 6 (1935); H. R. Rep. No. 1147, 74th Cong., 1st Sess. 8 (1935).

and would, if used, lead inevitably to discrimination in tenure of employment.[15] Nevertheless, with full realization that there was a limitation by the proviso of § 8 (3) upon the freedom of § 7, Congress inserted the proviso of § 8 (3). It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress. In reality whatever interference or discrimination was present here came not from the employer, but from fellow-employees of the dischargees. Shorn of embellishment, the Board's policy makes interference and discrimination by fellow-employees an unfair labor practice of the employer. Yet the legislative history conclusively shows that Congress, by rejecting the proposed Tydings amendment to the Act, refused to word § 7 so as to hamper coercion of employees by fellow-employees.[16] The emasculation of the contract

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[15] See statement of Senator Wagner: Hearings before Senate Committee on Education and Labor on S. 195, 74th Cong., 1st Sess. 47 (1935); Statement of Mr. Millis, *id.* at 179–180; and the Senate and House Reports accompanying the bill: S. Rep. No. 573, 74th Cong., 1st Sess. 16 (1935); H. R. Rep. No. 1147, 74th Cong., 1st Sess. 15–17 (1935).

[16] During consideration of the bill on the Senate floor, Senator Tydings proposed to amend it by adding to § 7 the words, "free from coercion or intimidation from any source." In the debate which followed it became clear that the amendment would deal with employee-against-employee relations, while the bill was designed to deal only with employee-employer relations, and the amendment was defeated. See 79 Cong. Rec. 7653–7658, 7675.

pressed for by the Board in order to achieve that which Congress refused to enact into law cannot be sustained.

It must be remembered that this is a contest primarily between labor unions for control. It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed-shop contract made voluntarily with the recognized bargaining representative, regardless of internal disruptions growing out of agitation for a change in bargaining representative. In the instant case the employees exercised their right to choose their bargaining representative. The representative bound them to a valid contract. The contract was lived under for four years and was subsisting at the period of time in question. It was made and carried out in good faith by petitioner, who cannot be held guilty of an unfair labor practice by administrative amendment of the statute. We reject the application of the so-called *Rutland Court* doctrine.

Nothing that this Court said in *Wallace Corp.* v. *Labor Board,* 323 U. S. 248, supports the Board's position here. In that case this Court said:

> "It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. To permit it to do so by indirection, through the medium of a 'union' of its own creation, would be to sanction a readily contrived mechanism for evasion of the Act." 323 U. S. at 256.

There the independent union was found to be a company-supported union, and the employer was found guilty of an unfair labor practice for supporting it. While the proviso to § 8 (3) permits a closed-shop contract, it does not permit one made with a union "established, maintained, or assisted by any action defined in this Act as

an unfair labor practice." So the Court concluded in the *Wallace Corp.* case that: "The Board therefore is authorized by the Act to order disestablishment of such unions and to order an employer to renounce such contracts." 323 U. S. at 251. Thus the *Wallace Corp.* case does not deal with the scope of protection afforded an employer by a valid closed-shop contract, because there was not and could not have been a valid closed-shop contract in that case.

The judgment of the Court of Appeals is reversed, with directions to the Board to dismiss the complaint.

Reversed.

MR. JUSTICE REED and MR. JUSTICE BURTON dissent. In their opinion the adjustment between § 7 and § 8 (3) made by the National Labor Relations Board is permissible. The use of the closed-shop privilege to interfere with the free exercise of the laborers' choice does not seem to them to be within the purpose of the Labor Act.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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UNITED STATES *v.* AETNA CASUALTY & SURETY CO.

NO. 35. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued October 19–20, 1949.—Decided December 12, 1949.

Notwithstanding R. S. § 3477, restricting assignments of claims against the United States, an insurance company may bring an action under the Federal Tort Claims Act in its own name against the United States upon a claim to which it has become subrogated by payment to an insured who would have been able to bring such action. Pp. 367–383.

(a) R. S. § 3477 does not bar transfers by operation of law. *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 556. Pp. 370–376.

(b) It was the understanding of Congress when it passed the Tort Claims Act that subrogation claims were not within the bar of R. S. § 3477. Pp. 376–380.

(c) Under Rule 17 (a) of the Federal Rules of Civil Procedure, which were specifically made applicable to Tort Claims litigation, an insurer-subrogee is a "real party in interest" and may sue in its own name—even though it may be subrogated to only part of a claim. Pp. 380–383.

Judgments affirmed.

In No. 35, a District Court dismissed an action against the United States under the Federal Tort Claims Act brought by an insurer who had reimbursed an employee of an insured for personal injuries resulting from negligence of a government employee. 76 F. Supp. 333. The Court of Appeals reversed. 170 F. 2d 469. This Court granted certiorari. 336 U. S. 960. *Affirmed*, p. 383.

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*Together with No. 36, *United States* v. *World Fire & Marine Insurance Co.*, on certiorari to the United States Court of Appeals for the Tenth Circuit; No. 37, *United States* v. *Yorkshire Insurance Co.*, on certiorari to the United States Court of Appeals for the Third Circuit; and No. 38, *United States* v. *Home Insurance Co.*, also on certiorari to the United States Court of Appeals for the Third Circuit.

In No. 36, the Court of Appeals affirmed a judgment against the United States under the Tort Claims Act in favor of an insurer who had partially reimbursed an insured whose property had been damaged through the negligence of a government employee. This Court granted certiorari. 336 U. S. 960. *Affirmed,* p. 383.

In Nos. 37 and 38, a District Court dismissed complaints against the United States under the Tort Claims Act brought by two insurers which had reimbursed an insured for property damages resulting from negligence of a government employee. The Court of Appeals reversed. 171 F. 2d 374. This Court granted certiorari. 336 U. S. 960. *Affirmed,* p. 383.

Leavenworth Colby argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Joseph Kovner.*

William A. Hyman argued the cause for respondent in No. 35. With him on the brief were *Harold W. Hayman* and *Melville Harris.*

By special leave of Court, *Jackson G. Akin, pro hac vice,* argued the cause for respondent in No. 36. *Pearce C. Rodey* was on the brief.

Abraham Frankel argued the cause and filed a brief for respondents in Nos. 37 and 38.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These cases, here on certiorari, present this important question under the Federal Tort Claims Act: [1] May an

[1] 60 Stat. 842; formerly codified as 28 U. S. C. § 931 *et seq.* The new Judicial Code became effective on Sept. 1, 1948, while these actions were pending on appeal, and the provisions formerly embodied in the Tort Claims Act are now distributed through various chapters of the new Code.

insurance company bring suit in its own name against the United States upon a claim to which it has become subrogated by payment to an insured who would have been able to bring such an action? That question, in turn, requires our consideration of R. S. 3477, the "anti-assignment" statute.[2]

Three cases, each presenting a slightly different aspect of the problem, were heard by the Court. In No. 35, the complaint alleges that an employee of the Federal Reserve Bank of New York was injured as a result of the negligence of a United States Post Office Department employee. Respondent insurance carrier had insured the Federal Reserve Bank against its liability for workmen's compensation, and duly paid the injured person's claim under the New York Workmen's Compensation Law. The complaint further alleges that the injured person failed to commence any action against the United States within one year after the accident, and that his inaction operated, according to New York law,[3] as an assignment to the insurer of his cause of action against the United States. The District Court dismissed the complaint, 76 F. Supp. 333, but the Court of Appeals for the Second Circuit reversed and remanded the cause for trial. 170 F. 2d 469.

In No. 36, the Government's motion to dismiss the complaint was denied, and, after trial, it was found as fact that an employee of the United States Forest Service had negligently driven a Government vehicle into a vehicle owned by one Harding, causing damages of $1,484.50;

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[2] 10 Stat. 170 as amended; 31 U. S. C. § 203.

[3] When this action was brought, § 29 of the New York Workmen's Compensation Act provided that if an injured employee has taken compensation but has failed to commence action against the tortfeasor within one year after the cause of action accrued, "such failure shall operate as an assignment of the cause of action against such other . . . to the person, association, corporation, or insurance carrier liable for the payment of such compensation."

that Harding was insured by the respondent insurance carrier and, pursuant to the terms of the policy, had been paid $784.50 by the insurer, to which it was now subrogated. Judgment was thereupon entered against the United States in favor of Harding for $700.00 and in favor of respondent insurance company for $784.50. The Court of Appeals for the Tenth Circuit affirmed.

Nos. 37 and 38 present the situation in which two insurance companies, each of which has paid part of a claim of loss occasioned by the negligence of an employee of the United States, bring suits in their own names, each asking recovery of the amount it has paid to the assured. The District Court dismissed the complaints on motion of the Government, but the Court of Appeals for the Third Circuit reversed and remanded the causes. 171 F. 2d 374.

We granted certiorari in these cases, 336 U. S. 960, because of a conflict of decisions in the circuits [4] and the manifest importance of the question.

The Federal Tort Claims Act provides in pertinent part that

> ". . . the United States district court for the district wherein the plaintiff is resident or wherein the act or

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[4] Courts of Appeals in seven circuits have upheld the right of subrogees to sue under the Tort Claims Act. *State Farm Mutual Liability Insurance Co.* v. *United States,* 1st Cir., 172 F. 2d 737; *Aetna Casualty & Surety Co.* v. *United States,* 2d Cir., 170 F. 2d 469; *Yorkshire Insurance Co.* v. *United States,* 3d Cir., 171 F. 2d 374; *United States* v. *South Carolina State Highway Dept.,* 4th Cir., 171 F. 2d 893; *Old Colony Insurance Co.* v. *United States,* 6th Cir., 168 F. 2d 931; *National American Fire Insurance Co.* v. *United States,* 9th Cir., 171 F. 2d 206; *United States* v. *Chicago, R. I. & P. R. Co.,* 10th Cir., 171 F. 2d 377.

The Court of Appeals for the Fifth Circuit reached a contrary conclusion, *United States* v. *Hill,* 171 F. 2d 404, Judge Hutcheson dissenting. Reargument was ordered before the full bench and, upon reconsideration, the original opinion was modified, 174 F. 2d 61, Judge Hutcheson concurring in the result "as in substantial accordance with the views the dissent expressed."

> omission complained of occurred, . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances . . . ." [5]

While the language of the Act indicates a congressional purpose that the United States be treated as if it were a private person in respect of torts committed by its employees, except for certain specific exceptions enumerated in the Act,[6] neither the terms of the Act nor its legislative history precludes the application of R. S. 3477 in this situation.

It is the Government's position that R. S. 3477, which in terms makes "All transfers and assignments . . . of any claim upon the United States, or of any part or share thereof, or interest therein . . . absolutely null and void . . ." except for assignments made after payment of the claim and in accordance with certain prescribed safeguards, includes assignments by operation of law and prohibits suit by the subrogee in its own name. Petitioner

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[5] Formerly 28 U. S. C. § 931. This section is now divided and, with immaterial changes, appears in 28 U. S. C. §§ 1346 (b) and 2674.

[6] See 28 U. S. C. § 2680.

reads R. S. 3477 not as prohibiting transfer of a claimant's substantive rights to an insurer-subrogee and ultimate recovery by the insurer but as a procedural requirement that the insurance carrier sue and recover judgment in the name of the original claimant. *United States* v. *American Tobacco Co.*, 166 U. S. 468 (1897). Its purpose in invoking the anti-assignment statute is said to be two-fold: "(1) to insure that the United States may avoid involvement in any litigation as to the existence or extent of subrogation or other assignment of such claims; and (2) to insure that the suits and any judgments against the United States will be in the names of the original claimants so that the United States will be able to avail itself of its statutory rights in respect of venue, and of counterclaim and offset on account of any cross-claims it may have against the original claimants." It is pointed out that "the provisions of the statute making void an assignment or power of attorney by a Government contractor are for the protection of the Government. *Hobbs* v. *McLean*, 117 U. S. 567, 576; *McGowan* v. *Parish*, 237 U. S. 285, 294, 295. In the absence of such a rule, the Government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Co.*, 300 U. S. 588, 594 (1937). The Government contends that the inconvenience, administrative and accounting difficulties, and procedural problems which, it is apprehended, may involve the Government if subrogees are permitted to bring suits under the Tort Claims Act in their own names make this an apt situation for application of R. S. 3477, and that that was the congressional intent.

It should be noted at the outset, however, that in the courts below and until argument in this Court (and even in its petition for certiorari) the Government contended that R. S. 3477 was a complete bar to recovery by a

subrogee. Only in brief and argument here was it suggested that the insurance carrier could recover if suit was brought in the name of the insured to the use of the insurer, citing for the first time *United States* v. *American Tobacco Co., supra,* a decision reflecting common-law procedure, upon which reliance is now placed.[7] It is for that reason that the opinions below were focused upon whether R. S. 3477 is an absolute bar to recovery by the subrogee rather than merely a bar to recovery in the name of the subrogee. We think, however, that even this limited, and somewhat anomalous,[8] reliance upon R. S. 3477 is untenable, first, because of the uniform interpretation given that statute by this Court for the past 75 years, and, second, because of many affirmative indications of congressional intent that subrogation claims should not be excluded from suit in the name of the subrogee under the Tort Claims Act.

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[7] This contention was also made in reargument of *United States* v. *Hill,* before the Court of Appeals for the Fifth Circuit, which took place after certiorari was granted by this Court. See note 4.

[8] Petitioner's argument is, in effect, that R. S. 3477 does not prevent the assignment of substantive rights against the United States but merely controls the method of procedure by which the assignee may recover. This position is in square conflict with *Spofford* v. *Kirk,* 97 U. S. 484, and is not justified by anything said in *Martin* v. *National Surety Co.,* 300 U. S. 588. Furthermore, it would require that the real party in interest provisions of the Federal Rules of Civil Procedure, Rule 17 (a), be disregarded, despite the fact that they are made specifically applicable to suits under the Tort Claims Act, and that suits against the Government in which a subrogee owns the substantive right be conducted according to the old common-law procedures in effect prior to the promulgation of the Federal Rules. Petitioner admits as much by its reliance upon *United States* v. *American Tobacco Co.,* 166 U. S. 468. This is not to say that R. S. 3477 was "repealed" by the Federal Rules, but that a new interpretation of the statute which is incompatible with the Rules, as expressly incorporated in the Tort Claims Act, must be clearly justified.

R. S. 3477 was enacted in 1853 as part of a statute entitled "An Act to prevent Frauds upon the Treasury of the United States." [9] Its primary purpose was undoubtedly to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government.[10] *Spofford* v. *Kirk,* 97 U. S. 484, 490 (1878). Another purpose, that upon which the Government now relies, has been inferred by this Court from the language of the statute. That purpose was to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant. *Spofford* v. *Kirk, supra; Goodman* v. *Niblack,* 102 U. S. 556, 560 (1881). Most of the early cases construed the statute strictly, holding that all assignments were included within the statute and that such assignments conferred no rights of any kind upon the assignee; that R. S. 3477 "incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." *Spofford* v. *Kirk, supra,* pp. 488–89. See also *National Bank of Commerce* v. *Downie,* 218 U. S. 345 (1910); *Nutt* v. *Knut,* 200 U. S. 12 (1906); *St. Paul & Duluth R. Co.* v. *United States,* 112 U. S. 733 (1885).

The rigor of this rule was very early relaxed in cases which were thought not to be productive of the evils which the statute was designed to obviate. And one of the first such exceptions was to transfers by operation of law. In *United States* v. *Gillis,* 95 U. S. 407 (1877), the Court held that a provision in the Act creating the Court

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[9] 10 Stat. 170.

[10] Other sections of the Act made it unlawful for officers of the United States or Members of Congress to have any interest in claims against the Government or to act for claimants, penalized bribery or undue influencing of Members of Congress, and prohibited the destruction or withdrawal of public records.

of Claims that suits on assignments may be brought in the name of the assignee did not mean that R. S. 3477 was inapplicable to suits in the Court of Claims, but referred to claims which were excepted from the prohibition of that statute, such as "devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law." During the following term a case was presented in which an assignee in bankruptcy had sued the United States on a claim of the bankrupt. This Court held the suit maintainable despite R. S. 3477, on the ground that

> "The act of Congress of Feb. 26, 1853, to prevent frauds upon the treasury of the United States, which was the subject of consideration in the *Gillis Case,* applies only to cases of voluntary assignment of demands against the government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the Court of Claims." *Erwin* v. *United States,* 97 U. S. 392, 397 (1878).

This construction of R. S. 3477—that assignments by operation of law are not within the prohibition of the statute—was recognized as settled law in *Goodman* v. *Niblack, supra,* and has been repeated with approval in a great many subsequent cases.[11]

The Government now contends, contrary to the statements in all of the cases approving *Erwin* v. *United States,*

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[11] See, *e. g., St. Paul & Duluth R. Co.* v. *United States,* 112 U. S. 733, 736; *Butler* v. *Goreley,* 146 U. S. 303, 311; *Hager* v. *Swayne,* 149 U. S. 242; *Ball* v. *Halsell,* 161 U. S. 72, 79; *Price* v. *Forrest,* 173 U. S. 410, 421; *National Bank of Commerce* v. *Downie,* 218 U. S. 345, 356; *Western Pacific R. Co.* v. *United States,* 268 U. S. 271, 275.

supra, that an assignment by operation of law is not always exempt from the bar of R. S. 3477, but that in addition the assignment must be of a kind that will not involve the Government in the procedural difficulties previously referred to. All of the cases in which R. S. 3477 has been held inapplicable on the ground of assignment by operation of law are explained as presenting situations in which the Government could suffer no such procedural embarrassments. In cases of transfer by descent (*Erwin* v. *United States, supra*), consolidation of corporations (*Seaboard Air Line R. Co.* v. *United States,* 256 U. S. 655 (1921)), and purchase at a judicial sale in a corporate reorganization (*Western Pacific R. Co.* v. *United States,* 268 U. S. 271 (1925)) it is pointed out that the Government may deal with the substituted representative as it would have dealt with the claimant if there had been no substitution. Rights of counterclaim and set-off are said to be retained against the universal successor, while such universal assignments by operation of law can give rise to no controversies as to the existence and extent of the transfer for adjudication between the United States and the original claimant and his trustee, receiver, or administrator.

Without considering whether some of the cases are not comprehended within this rationale,[12] we do not think that it explains the exception made for transfers by operation of law in the cases referred to. In the first place, the Court has always stated the flat exception of *all* transfers by operation of law, as distinguished from voluntary transfers. If the cases rest upon the premise advanced by the Government, it has never been articulated in the opinions. In the second place, and consistent with

[12] For example, transfers by will or intestacy, which are not within the prohibition of R. S. 3477 under the cases, would obviously multiply the persons with whom the United States must deal and might very well embroil it in conflicting claims.

the exception of all transfers by operation of law, this Court has a number of times indicated that neither of the purposes of R. S. 3477 is contravened by transfers by operation of law. In *Goodman* v. *Niblack, supra,* it was held that:

> "The language of the statute, 'all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein,' is broad enough (*if such were the purpose of Congress*) to include transfers by operation of law, or by will. Yet we held it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that *there can be no purpose in such cases to harass the government* by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made." (102 U. S. at 560; italics added.) See also *Hager* v. *Swayne,* 149 U. S. 242, 247–48 (1893).

The fact that some administrative problems may be the unintended by-products of an involuntary assignment was not thought to be an evil within the scope of a statute aimed at fraud and harassment. That interpretation has, for nearly a century, exempted all transfers by operation of law from the prohibition of R. S. 3477.

That it was the understanding of Congress that subrogation claims were not within the bar of R. S. 3477 when it passed the Tort Claims Act is abundantly clear from a number of different particulars:

1. The Small Tort Claims Act of 1922 [13] provided that heads of departments may "consider, ascertain, adjust, and determine any claim . . . on account of damages to

[13] 42 Stat. 1066, 31 U. S. C. § 215.

or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment." Such claims as were found due were certified to Congress for payment. A question was directed to the Attorney General in 1932 as to "whether such a claim, which if made by the owner of the property damaged could have been certified, may properly be certified if made by an insurance company which has become subrogated to the rights of the owner to receive compensation for the damage suffered." Attorney General Mitchell's opinion [14] was: (1) that subrogation is a transfer by operation of law of the right to receive payment of the amount due; and (2) that R. S. 3477 applies only to cases of voluntary assignment of demands against the Government. He thought, however, that inasmuch as the question was one concerning the purpose and intent of Congress in enacting the Small Tort Claims Act, that body should be asked to interpret the statute by passing upon subrogation claims certified to it and expressly called to its attention. Thereafter subrogation claims in the names of insurance carriers were regularly submitted to Congress and were consistently approved until the Act was repealed by the present Tort Claims Act. The Attorney General's opinion was approved and congressional acquiescence noted by the Comptroller General in opinions in 19 Comp. Gen. 503, 21 Comp. Gen. 341, and 22 Comp. Gen. 611. A unique interpretation by Congress of its own statute thus settled the question whether R. S. 3477 was a bar to subrogation claims under the Small Tort Claims Act, which, in language nearly identical with that of the present Tort

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[14] Reported at 36 Op. Atty. Gen. 553. See Holtzoff, *Handling of Tort Claims Against the Federal Government,* 9 Law & Contemp. Prob. 311, 318; *The Federal Tort Claims Act,* 42 Ill. L. Rev. 344, 349.

Claims Act, permitted recovery "on account of damages to or loss of privately owned property . . . ."

2. That specific reference in the statute was necessary to preclude recovery by subrogees in their own names (*i. e.*, that R. S. 3477 is inapplicable to subrogees) was clearly the view of Congress when it enacted the Tort Claims Act. For in foreign claims legislation where it intended that result, Congress explicitly provided that Claims Officers should consider, ascertain, determine, and pay claims on account of injury or death, or property loss or damage to claimants in foreign countries, "including claims of insured but excluding claims of subrogees." [15] The purpose of this provision, which was enacted in 1943, was to fulfill the very office which petitioner now contends is performed by R. S. 3477.[16] No such exception is found in the Tort Claims Act, although other exceptions are spelled out with great particularity. The significance of this provision in the foreign claims statute is, first, that when Congress wished to exclude claims by subrogees it said so; and second, that Congress did not think R. S. 3477 performed that function. For a similar provision, see 49 Stat. 2194.[17]

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[15] 57 Stat. 66, 31 U. S. C. § 224d.

[16] The House Committee Report states that "Such a provision of law leaves undisturbed, as between the parties, the rights of the insured and of insurance companies and others who have become subrogated to the rights of the owners of the property or of the person who is injured or whose death results, but permits the Government to settle with a single claimant and without the necessity of inquiry into, or determination of, the relative rights of the parties." H. R. Rep. No. 312, 78th Cong., 1st Sess., p. 2.

[17] That members of the House Committee on Claims were aware of the problem of recovery by insurance carrier-subrogees at the time the Tort Claims Act was passed is demonstrated by that Committee's report, submitted less than two weeks prior to passage of the Act, on subrogation claims presented by insurance companies in connection with the crash of an army airplane into the Empire

3. Nor did executive departments themselves interpret R. S. 3477 as applicable to subrogation claims, as the report of the hearings on H. R. 6442, 77th Cong., 2d Sess. (1942) makes plain. That bill, which was drafted by the Treasury Department, would have required subrogees to institute actions against their subrogors in some court of competent jurisdiction, which would then restrain the original claimant from receiving any funds from the Government until final decision was reached as to who was to receive the money. The Assistant General Counsel of the Treasury, in explaining the bill, stated:

> "In 1877 the Supreme Court, in the case of *U. S.* v. *Gillis* (95 U. S. 407), after stating in effect that

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State Building. The War Department had recommended to Congress that Empire State, Inc., and other private claimants be paid their uninsured losses (which was done) but refused to recommend payment of insured losses. H. R. 6683 was introduced "to appropriate the sum of $143,279.94 to 22 fire-insurance companies in full satisfaction of their subrogation claims against the United States . . . ." The Committee made specific reference to Attorney General Mitchell's opinion, noted that since that time the War Department had paid subrogation claims of less than $1,000 under the Military Claims Act, 31 U. S. C. § 223, and disapproved that department's refusal to certify claims of over $1,000. To the assertion that Congress had consistently refused to recognize subrogation claims as barred by R. S. 3477, the Committee report contains the flat denial: "That statement is not in accordance with the fact" and cites a number of subrogation claims favorably acted upon by Congress. The bill was favorably reported, H. R. Rep. No. 2655, 79th Cong., 2d Sess., but nine days later the Tort Claims Act was passed, § 131 of which provided that no private bill should authorize payment of money for claims for which suit might be brought under that Act, extending retroactively to claims accruing after January 1, 1945. Since the claims involved had accrued subsequent to that date, the insurance company subrogees brought suit in a federal district court, where the Government once more interposed a defense based on R. S. 3477, despite the Committee's specific approval of payment directly to the subrogees. The defense was rejected. *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850.

section 3477 was of universal application and covered all claims against the United States in every tribunal in which they might be asserted, indicated in language not necessary to the decision that transfers or assignments compelled by law or resulting from the operation of law might not have been within the purview of section 3477.

"Now from that time on one exception after another has been carved from section 3477, until now the courts recognize many types of adverse claims as the basis for what in effect are third-party suits against the Government, including suits based upon assignments by operation of law, subrogation, and equitable liens." Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, on H. R. 6442, 77th Cong., 2d Sess. (1942), at p. 3.

It cannot therefore be seriously contended that Congress and the executive departments were not cognizant of the exemption of subrogation claims from R. S. 3477 when the Tort Claims Act was passed. The broad sweep of its language assuming the liability of a private person, the purpose of Congress to relieve itself of consideration of private claims, and the fact that subrogation claims made up a substantial part of that burden are also persuasive that Congress did not intend that such claims should be barred.

If, then, R. S. 3477 is inapplicable, the Government must defend suits by subrogees as if it were a private person. Rule 17 (a) of the Federal Rules of Civil Procedure, which were specifically made applicable to Tort Claims litigation,[18] provides that "Every action shall be prosecuted in the name of the real party in interest," and of course an insurer-subrogee, who has substantive equitable rights, qualifies as such. If the subrogee has paid

[18] Formerly 28 U. S. C. § 932. See note 8, *supra*.

an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. 3 Moore, Federal Practice (2d ed.) p. 1339. If it has paid only part of the loss, both the insured and insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tortfeasor which qualify them as real parties in interest.

In cases of partial subrogation the question arises whether suit may be brought by the insurer alone, whether suit must be brought in the name of the insured for his own use and for the use of the insurance company, or whether all parties in interest must join in the action. Under the common-law practice rights acquired by subrogation could be enforced in an action at law only in the name of the insured to the insurer's use, *Hall & Long* v. *Railroad Companies,* 13 Wall. 367 (1872); *United States* v. *American Tobacco Co., supra,* as was also true of suits on assignments, *Glenn* v. *Marbury,* 145 U. S. 499 (1892). Mr. Justice Stone characterized this rule as "a vestige of the common law's reluctance to admit that a chose in action may be assigned, [which] is today but a formality which has been widely abolished by legislation." *Aetna Life Ins. Co.* v. *Moses,* 287 U. S. 530, 540 (1933). Under the Federal Rules, the "use" practice is obviously unnecessary, as has long been true in equity, *Garrison* v. *Memphis Insurance Co.,* 19 How. 312 (1857), and admiralty, *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.,* 129 U. S. 397, 462 (1889). Rule 17 (a) was taken almost verbatim from Equity Rule 37. No reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer "own" portions of the substantive right and should appear in the litigation in their own names.

Although either party may sue, the United States, upon timely motion, may compel their joinder. *Delaware County* v. *Diebold Safe & Lock Co.,* 133 U. S. 473, 488

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(1890) (applying a state code under the Conformity Act). 3 Moore, Federal Practice (2d ed.) p. 1348. Both are "necessary" parties. Rule 19 (b), Federal Rules of Civil Procedure.[19] The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim. Additional parties may be added at any stage of the proceedings, on motion of the United States, upon such terms as may be just. Rule 21.

It is true that under this rationale, there will be cases in which all parties cannot be joined because one or more are outside the jurisdiction, and the court may nevertheless proceed in the action under Rule 19 (b). In such cases the United States, like other tortfeasors, may have to defend two or more actions on the same tort and may be unable to assert counterclaims and offsets against the original claimant upon unrelated transactions.[20]

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[19] They are clearly not "indispensable" parties under the familiar test of *Shields* v. *Barrow*, 17 How. 130, 139 (1855), that such parties have "an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." See *Delaware County* v. *Diebold Safe & Lock Co.*, 133 U. S. 473, 488 (1890); *Hubbard* v. *Manhattan Trust Co.*, 87 F. 51; *Rogers* v. *Penobscot Mining Co.*, 154 F. 606; 3 Moore, Federal Practice (2d ed.) p. 2178.

[20] The counterclaim statute, 28 U. S. C. § 1346 (c), confers jurisdiction on district courts over any "counterclaim, or other claim or demand whatever on the part of the United States against any *plaintiff* commencing an action." The offset statute, 31 U. S. C. §§ 71, 227, directs the deduction from judgments and allowed claims against the United States of debts as to which "the *plaintiff* therein shall be indebted to the United States." (Italics added.) We need not and do not consider what rights of counterclaim and set-off may lie in the United States in suits brought by insurer-subrogees. Cf. *United States* v. *Munsey Trust Co.*, 332 U. S. 234 (1947); *Defense Supplies Corp.* v. *United States Lines Co.*, 148 F. 2d 311.

If R. S. 3477 is inapplicable, as we think is clearly the case, these objections have no legal foundation upon which to rest. In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The decision of the Court of Appeals in each of these cases is

Affirmed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

O'DONNELL, ADMINISTRATRIX, *v.* ELGIN, JOLIET & EASTERN RAILWAY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 56. Argued October 21, 1949.—Decided December 12, 1949.

In an action under the Federal Employers' Liability Act to recover damages for a death claimed to have been proximately caused by the breaking of an automatic coupler, the complaint mingled in a single cause of action charges of general negligence and a specific charge that defendant "carelessly and negligently" violated the Safety Appliance Act by operating a car not equipped with the prescribed coupler. The trial court denied plaintiff's request for instructions that the breaking of the coupler was negligence *per se* and submitted the whole case to the jury indiscriminately as a negligence case. The jury found for defendant. *Held:* As to the claim based on the Safety Appliance Act, plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in a switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability. Pp. 385–394.

(a) The Safety Appliance Act requires couplers, which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control. Pp. 387–389.

(b) A failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability that cannot be escaped by proof of care or diligence. Pp. 389–392.

(c) Pleadings will serve their purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the Safety Appliance Act. P. 392.

(d) Even though no objection be made to an improper pleading in a case such as this, it is almost indispensable to an intelligible charge to the jury that a clear separation between claims based on negligence and those based on violation of the Safety Appliance Act be observed and impressed. P. 393.

(e) Evidence pertinent to negligence is immaterial to issues raised by a claim based on violation of the Safety Appliance Act. Pp. 393–394.

171 F. 2d 973, reversed.

The Court of Appeals affirmed a judgment for the defendant in an action under the Federal Employers' Liability Act. 171 F. 2d 973. This Court granted certiorari. 337 U. S. 929. *Reversed*, p. 394.

Joseph D. Ryan argued the cause and filed a brief for petitioner.

Harlan L. Hackbert argued the cause and filed a brief for respondent.

Mr. Justice Jackson delivered the opinion of the Court.

This action was brought under the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60. The complaint mingled in a single count or cause of action charges of general negligence and a specific charge that defendant "carelessly and negligently" violated the Safety Appliance Act, 45 U. S. C. § 2, by operating a car not equipped with the prescribed coupler. The jury found against plaintiff and judgment for defendant was affirmed by the Court of Appeals. 171 F. 2d 973. This result must stand if the jury was properly instructed, as to which the Court of Appeals divided.

O'Donnell, whose administratrix is petitioner here and was plaintiff below, met an unwitnessed death while working in defendant's yards as a member of its switching crew. When last seen, he was going to adjust the couplers on certain cars which previously had failed to couple by impact. Shortly after his departure, as the result of the breaking of a coupler, two cars broke loose from a cut of cars that was being moved in a switching

operation. Running free, they collided with other standing cars and drove them against those whose couplers decedent had said he was going to adjust. Some time later decedent's mangled body was found lying across one rail of the track on which the cars he had intended to prepare for coupling had stood. That he had gone between them to adjust the couplers is suggested by the fact that they coupled upon impact with the colliding cars, though they previously had failed so to do. Petitioner's contention, from all the circumstances proved, is that O'Donnell's death was proximately caused by the breaking of the coupler, which permitted the two cars to run free, strike the standing cars, and cause unexpected movement of the cars between which O'Donnell was engaged. Respondent contends that they indicate instead that death resulted from a later and independent movement on the track when the runaway cars were hauled out—an event which took place before discovery of decedent's body but after the collision of the two sets of cars. We need not resolve the conflict between these competing theories of causation, for that decision was for the jury. *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653.

Our concern is with the effect accorded by the trial court's instructions to the breaking of the coupler. The issue was defined by the Court of Appeals: "The record is devoid of any request by plaintiff that the jury be instructed that they might infer negligence from the breaking of the coupler, but in the District Court plaintiff contended for and tendered instructions upon the theory that a breaking of the coupler in and of itself was negligence per se. The court refused to so instruct." 171 F. 2d at 976. The Court of Appeals, with one dissent, sustained this refusal so to charge, saying, "We do not believe the Act required defendant to furnish couplers that would not break. We think the true rule is that where a cou-

pler does break, the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act. The cases go no further than to hold that from the breaking of a coupler the jury may infer negligence." As this view of the Safety Appliance Act appears to conflict with the rule laid down in other jurisdictions,[1] we granted certiorari. 337 U. S. 929.

A close and literal reading of the Safety Appliance Act, 45 U. S. C. § 2,[2] suggests that two functions only are required of couplers: that they couple automatically by impact and that they uncouple without requiring men to go between the ends of the cars. This construction finds some support in the decisions. See, *e. g., St. Louis & San Francisco R. Co.* v. *Conarty,* 238 U. S. 243, 250; *Chicago, B. & Q. R. Co.* v. *United States,* 220 U. S. 559, 571; *Louisville & Nashville R. Co.* v. *Layton,* 243 U. S. 617; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 18. See also *United States* v. *Southern R. Co.,* 135 F. 122, 127 (S. D. Ill., 1905); *Chesapeake & Ohio R. Co.* v. *Charlton,* 247 F. 34, 40 (C. A. 4th Cir., 1917); *Chicago, M.,*

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[1] *Philadelphia & R. R. Co.* v. *Eisenhart,* 280 F. 271 (C. A. 3d Cir., 1922); *Keenan* v. *Director General of Railroads,* 285 F. 286 (C. A. 2d Cir., 1922); *McAllister* v. *St. Louis Merchants Bridge Terminal R. Co.,* 324 Mo. 1005, 1014, 25 S. W. 2d 791, 796 (1930); *Southern Pacific Co.* v. *Thomas,* 21 Ariz. 355, 360–361, 188 P. 268, 270 (1920); *Kowalski* v. *Chicago & N. W. R. Co.,* 159 Minn. 388, 392–393, 199 N. W. 178, 180 (1924); *Saxton* v. *Delaware & Hudson Co.,* 256 N. Y. 363, 176 N. E. 425 (1931). *Cf. Vigor* v. *Chesapeake & O. R. Co.,* 101 F. 2d 865, 868 (C. A. 7th Cir., 1939); *Western & Atl. R. Co.* v. *Gentle,* 58 Ga. App. 282, 295, 198 S. E. 257, 265 (1938).

[2] "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

St. P. & P. R. Co. v. *Linehan,* 66 F. 2d 373, 377 (C. A. 8th Cir., 1933); *Penn* v. *Chicago & N. W. R. Co.,* 163 F. 2d 995, 997 (C. A. 7th Cir., 1947).

Courts at other times have held, however, that failure of couplers to remain coupled until released constitutes or evidences a violation of the Act just as does their failure to couple upon impact or uncouple from the sides of cars. As stated by the Court of Appeals, Second Circuit, the Act "is also aimed at insuring couplers that will hold together." *Keenan* v. *Director General of Railroads,* 285 F. 286, 290 (C. A. 2d Cir., 1922); *Philadelphia & R. R. Co.* v. *Eisenhart,* 280 F. 271 (C. A. 3d Cir., 1922); *Erie R. Co.* v. *Caldwell,* 264 F. 947 (C. A. 6th Cir., 1920); *Southern Pacific Co.* v. *Thomas,* 21 Ariz. 355, 188 P. 268; *Kowalski* v. *Chicago & N. W. R. Co.,* 159 Minn. 388, 199 N. W. 178; *McAllister* v. *St. Louis Merchants Bridge Terminal R. Co.,* 324 Mo. 1005, 25 S. W. 2d 791; *Saxton* v. *Delaware & Hudson Co.,* 256 N. Y. 363, 176 N. E. 425; *Stewart* v. *Wabash R. Co.,* 105 Neb. 812, 182 N. W. 496. And see *Reetz* v. *Chicago & E. R. Co.,* 46 F. 2d 50 (C. A. 6th Cir., 1931). This appears also to have been the view of this Court in the only case of this nature ever before it. *Minneapolis & St. Louis R. Co.* v. *Gotschall,* 244 U. S. 66. See also *Minneapolis, St. Paul & Sault Ste. Marie R. Co.* v. *Goneau,* 269 U. S. 406.

It is hard to think of a coupler defect in which greater danger inheres to workmen, travelers and all to whom the railroad owes a duty, than one which sets cars running uncontrolled upon its tracks. We find it difficult to read the Safety Appliance Act to require that cars be equipped with appliances which couple automatically by impact and which may be released without going between the ends of cars, but which need not remain coupled in the meantime. The Act so construed would guard against dangers incident to effecting an engagement or

disengagement while ignoring the even greater hazards which can result from the failure of a coupling to perform its main function, which is to stay coupled until released.

We hold that the Safety Appliance Act requires couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control.

What then should a jury be instructed is the consequence of a failure to provide couplers that so perform? Should the jury be instructed that it must find liability or merely that it may find liability for injuries proximately resulting from the failure?

The arguments and instructions in this case, as well as others, and the language of many opinions and texts reflect widespread confusion as to the effect to be accorded a violation of the federal safety appliance statute.[3] Part of this confusion is traceable to the diversity of judicial opinion concerning the consequences attributed in negligence actions to the violation of a statute.[4]

[3] *E. g., San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 476; *Minneapolis & St. Louis R. Co.* v. *Gotschall,* 244 U. S. 66; *Southern Pac. Co.* v. *Thomas,* 21 Ariz. 355, 361, 188 P. 268, 270; *Western & Atlantic R. Co.* v. *Gentle,* 58 Ga. App. 282, 198 S. E. 257; *Vigor* v. *Chesapeake & O. R. Co.,* 101 F. 2d 865, 869. See also 2 Roberts, Federal Liabilities of Carriers, §§ 620, 655 *et seq.*, 789, 790 (2d ed. 1929); 2 Shearman & Redfield on Negligence, § 183 (rev. ed. 1941); Thornton, Federal Employers' Liability and Safety Appliance Acts, §§ 289, 302, 311 (3d ed. 1916); Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts, §§ 56, 217, 252 (2d ed. 1916).

[4] For discussions of the general problem and illustrative cases, see Prosser on Torts, § 39; Harper, Law of Torts, § 78; Bohlen, Cases on Torts, pp. 187–204 (3d ed. 1930); 1 Shearman & Redfield on Negligence, §§ 11, 12 (rev. ed. 1941); 2 Restatement of the Law of Torts, §§ 286–288; Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317; Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361.

Breach of certain statutes in various jurisdictions will be regarded as some evidence of negligence, to be weighed by the jury along with the facts. *Hayes* v. *Michigan Central R. Co.,* 111 U. S. 228, 240; *Union Pacific R. Co.* v. *McDonald,* 152 U. S. 262, 283. At other times or places, or under other statutes, a violation may be "prima facie" or "presumptive" evidence of negligence which defendant must meet or overcome. *E. g., Voiles* v. *Hunt,* 213 Iowa 1234, 240 N. W. 703. Courts sometimes talk of it in terms of *res ipsa loquitur, cf. Minneapolis & St. Louis R. Co.* v. *Gotschall, supra,* or treat violations as negligence *per se. E. g., San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 484; *Watts* v. *Montgomery Traction Co.,* 175 Ala. 102, 57 So. 471; *Evans* v. *Klusmeyer,* 301 Mo. 352, 359, 256 S. W. 1036, 1037–1038. It is not uncommon that within the same jurisdiction the rule is different as to different statutes. See *Martin* v. *Herzog,* 228 N. Y. 164, 168, 126 N. E. 814, 815. But usually, unless the statute sets up a special cause of action for its breach, a violation becomes an ingredient, of greater or lesser weight, in determining the ultimate question of negligence.

But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. *St. Louis, I. M. & S. R. Co.* v. *Taylor,* 210 U. S. 281, 294; *Chicago, B. & Q. R. Co.* v. *United States, supra,* 575–577; *Delk* v. *St. Louis & S. F. R. Co.,* 220 U. S. 580. These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not

excused by any showing of care however assiduous." *Brady* v. *Terminal Railroad Assn.*, 303 U. S. 10, 15.

Notwithstanding this Court's efforts to distinguish the safety appliance violation case from the common law negligence case, confusion of the two persists, in part, at least, due to the anomalous procedure by which such claims are litigated. This non-negligence claim, based on a statutory violation, is pursued by action under the Federal Employers' Liability Act, basically a form of action predicated only upon negligence.[5] The appliance cause often is joined with one for negligence, and even sometimes, as here, mingled in a single mongrel cause of action. In addition, at trial, certain issues such as causation and extent of injury, for example, are common to both causes of action. All of this has resulted in much borrowing of the language of negligence law to deal with Safety Appliance Act cases. And so, in an early case in which this Court held, "If this Act is violated, the question of negligence in the general sense of want of care is immaterial," we find that it went on nevertheless to say that the violation is treated "as 'negligence'—what is sometimes called negligence *per se*." *San Antonio & A. P. R. Co.* v. *Wagner, supra.*

In a later case, the contention in this Court involved the rule of *res ipsa loquitur,* a maxim of the law of evidence applicable in some negligence cases. The trial court had charged that from the breaking of the coupler the jury might infer negligence, which was the instruction which had been requested by the plaintiff. The railroad opposed this instruction. This Court, in an opinion an-

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[5] Section 1 of the Federal Employers' Liability Act, 45 U. S. C. § 51, provides that "Every common carrier by railroad . . . shall be liable in damages . . . for such injury or death resulting in whole or in part . . . by reason of any defect or insufficiency, due to its negligence . . . ." And see *Seaboard Air Line R. Co.* v. *Horton,* 233 U. S. 492, 501–502.

ticipatory of this one, upheld the charge against the objection. Since the plaintiff had recovered a verdict, this Court, in affirming, found no occasion to consider whether the plaintiff would have been entitled to a more favorable charge. But the opinion negativing the railroad's objection as inconsistent with the absolute liability imposed by the Act appears in the headnote as a holding "that, in view of the Safety Appliance Act, negligence might be inferred from the mere opening of the couplers." *Minneapolis & St. Louis R. Co.* v. *Gotschall, supra.* Thus the vocabulary of negligence, appropriated to non-negligence uses, comes to dominate the thought.

We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking. We think the unfortunately prolonged course of this litigation is in no small part due to the failure to heed the admonition well stated by the Court of Appeals of the Seventh Circuit in a similar case: "Of course, it is not proper to plead different theories in the same paragraph, but it is not necessarily fatal especially when the adversary makes no objection." *Vigor* v. *Chesapeake & Ohio R. Co.*, 101 F. 2d 865, 869 (1939). Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the appliance acts.[6]

[6] This, after all, is the command of Rule 10 (b), Federal Rules of Civil Procedure, which provides: "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances . . . ."

Professor Moore, in discussing this Rule with reference to claims based upon both common law and statutory grounds, states: "Separate statement by way of counts is not required; separate paragraphing in setting out the grounds in the above actions is desirable and required." 2 Moore's Federal Practice, 2006–2007 (2d ed. 1948).

But no matter how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. The trial court in this case submitted the whole indiscriminately as a negligence case. This is hardly to be regarded as reversible error, for both counsel pleaded and tried the case as such and their requests were stated entirely in terms of the law of negligence. But the scrambling of the claims in this case illustrates how much evidence may be admitted, submitted and considered on negligence issues that, under our repeated holdings, would be immaterial in case of violation of the Safety Appliance Acts.

The plaintiff, for example, can add nothing to the liability incurred from a violation of the Act by producing evidence of negligence. Here there was affirmative and, so far as we can find, uncontradicted testimony that there was "a partial fracture on the inside of the coupler," indicating that the coupler was weakened by an old defect. However important this evidence might have been in determining common law negligence, it added nothing to the direct case under the Safety Appliance Act made by showing the breaking of the coupler.

The defendant stressed evidence that in the switching operation the coupler broke concurrently with an emergency stop. Such evidence might be material on the question of negligence. But the Act certainly requires equipment that will withstand the stress and strain of all ordinary operation, grades, loadings, stops and starts, including emergency stops. A defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it, nor by showing that while the coupler broke it had been properly manufactured, diligently inspected and showed no visible defects. These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that

is not enough to explain away its liability if it has violated the Act.[7]

Criticism is made that petitioner's requests to charge were not sufficiently specific. That they were somewhat general in statement and were cast in terms of a negligence case is true. But the Court of Appeals found these requests sufficiently specific and pertinent to the issues to present the question which it decided. And in deciding this question the way it did, we believe it has fallen into error. We make no examination of the charge insofar as it related to the issue of general negligence. As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability.

Reversed.

MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consideration or decision of this case.

MR. JUSTICE BURTON, with whom MR. JUSTICE REED concurs, dissenting.

We do not agree that the Safety Appliance Acts contain a mandatory requirement that cars used in moving

[7] We do not say that a railroad may never effectively defend under the Act by showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness; such, for example, as the work of a saboteur. And we do not find it necessary to consider a situation where an adequate coupler failed to hold because it was improperly set, since such facts are not before us.

interstate traffic must be equipped with couplers that "will remain coupled until set free by some purposeful act of control."[1] Congress might have so legislated, as it did in the section which required cars to be equipped with "efficient hand brakes; . . . ."[2] See *Myers* v. *Reading Co.*, 331 U. S. 477. However, it did not do so. Accordingly, the trial judge, on this phase of this case, was justified in omitting any instruction to the jury that, if the railroad used a car equipped with a coupler that broke in the switching operation, it thereby violated the Safety Appliance Acts.

In our view, the separating of the cars at the broken coupler was properly treated as material evidence from which the jury could infer that the railroad had violated the prohibition of the Acts against using cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."[3] *Vigor* v. *Chesapeake & O. R. Co.*, 101 F. 2d 865. Cf. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1. The jury was adequately instructed to that effect.

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[1] *Supra*, p. 389.

[2] 36 Stat. 298, 45 U. S. C. § 11.

[3] 27 Stat. 531, 45 U. S. C. § 2.

UNITED STATES *v.* TORONTO, HAMILTON & BUFFALO NAVIGATION CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 39. Argued November 9, 1949.—Decided December 12, 1949.

Under authority of § 902 of the Merchant Marine Act of 1936, as amended, the United States requisitioned respondent's fresh-water car ferry on Lake Erie. The vessel was built in 1916; was in service on Lake Erie from that year until 1932; and, except for a 2-year charter period, was idle from 1932 until requisitioned in 1942. In determining the amount of just compensation required by the Fifth Amendment to be paid respondent, the Court of Claims, absent evidence of "market value," relied upon the earnings of the vessel from 1916 to 1932 and upon the "demand" for such a vessel for use between Florida and Cuba. *Held:*

1. On the record in this case, the Court of Claims erred in relying on the vessel's 1916–1932 earnings. Pp. 402–403.

(a) Where, as here, it is impossible to determine "market value" as a basis for just compensation, other measures of value may be relevant. Pp. 402–403.

(b) Past earnings are significant in assessing value only when they tend to reflect future returns. P. 403.

(c) On the record, the vessel's 1916–1932 earnings were without relevance on the issue of its capacity to earn after 1942, on the Great Lakes or elsewhere. P. 403.

2. On the record in this case, the Court of Claims erred in according weight to Florida values. Pp. 404–407.

(a) To justify consideration of Florida values, the burden was on the respondent to show that it was likely that a prospective Florida buyer would have investigated the Great Lakes market and considered a vessel like respondent's moored to its Ohio dock; or that the ordinary Great Lakes owner would have taken the trouble and expense to send a vessel to Florida for a possible sale; or that either of these possibilities would have had an effect on price had respondent's vessel been sold on the Great Lakes. P. 406.

(b) The question in such case is what the ordinary businessman in the trade would have done, not what the owner would have done. P. 406.

(c) Respondent's burden of proof was not met by a bare record of five sales, three of which were to the United States, and but one on the Great Lakes for Florida use—and that after the war's end. P. 406.

(d) A finding by the Court of Claims that there were probabilities of sale in Florida in 1942 sufficient to warrant consideration of demand there in fixing the value of respondent's vessel, on substantial evidence not now before this Court, is not foreclosed; but the Court of Claims is not bound to accept any geographic price range at full value. Pp. 406–407.

112 Ct. Cl. 240, 81 F. Supp. 237, reversed.

In an action against the United States to recover just compensation for a vessel requisitioned under § 902 of the Merchant Marine Act of 1936, as amended, the Court of Claims awarded judgment in favor of the claimant, respondent here. 112 Ct. Cl. 240, 81 F. Supp. 237. This Court granted certiorari. 336 U. S. 965. *Reversed and remanded,* p. 407.

Paul A. Sweeney argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Assistant Attorney General Morison.*

Gerald E. Dwyer argued the cause for respondent. With him on the brief were *Frederick L. Wheeler* and *C. Austin White.*

Mr. Justice Clark delivered the opinion of the Court.

We are faced again with elusive questions of property valuation in determining whether the United States awarded "just compensation" under the Fifth Amendment when it took the respondent's car ferry, the *Maitland No. 1,* under the authority of § 902 of the Merchant Marine Act of 1936, as amended, 53 Stat. 1254, 1255, 46 U. S. C. § 1242. The Government requisitioned the vessel in 1942, and determined its fair value as $72,500. In 1943, respondent exercised its option to accept 75 per

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cent of the award, and in 1945 brought action in the Court of Claims to recover $711,753 as the additional amount necessary for just compensation. The Court, two judges dissenting, held that the fair value of the *Maitland* was $161,833.72, more than twice the Government's original determination. 112 Ct. Cl. 240, 81 F. Supp. 237. We brought the case here on certiorari, 336 U. S. 965, because it presents problems of difficulty and importance in the practical application of the general standard of just compensation.

The facts were found by the Court of Claims. They must be stated in some detail.

1. The *Maitland No. 1* was a conventional, steel-hull, two-stacker, twin-screw ferry for railroad cars, built in 1916. Until 1932 she plied across Lake Erie between Ashtabula, Ohio, and Port Maitland, Canada. She was respondent's only ship on that route, and her principal cargo was coal for a steel company in Hamilton, Ontario. On the Canadian side, respondent's connecting rail line moved the coal to destination in Hamilton. But a more convenient route on Lake Ontario caused a sharp decline in respondent's traffic beginning in 1928. And when the "new Welland Canal" between Lake Erie and Lake Ontario was opened in 1932, and larger ships carried the load directly to Hamilton, respondent abandoned the line. From 1932 to 1935 the *Maitland* was laid up at her dock in Ohio.

On November 29, 1935, respondent chartered the ship at an unspecified rate to a company ferrying freight across Lake Michigan, and thereafter, for the convenience of the parties, title was transferred to the Lake Michigan concern. The transfer recited a total consideration of $166,000 and included a "recapture" clause. On December 15, 1937, this right was exercised and upon payment of $92,894.80 the *Maitland* was returned to Ashtabula where she lay until requisitioned in August, 1942.

2. *Cost, book and scrap value, upkeep and earnings of Maitland.*—The *Maitland* was built in 1916 at a cost of $362,800. Respondent, a wholly owned subsidiary of the New York Central and Canadian Pacific Railways, acquired her from respondent's own president in that year, paying $394,560. From 1917 to 1930, respondent spent $38,115.46 for "additions and betterments to the vessel." Repairs from 1922 to 1932 amounted to $20,329.11 per annum. Lay-up expenses from 1938 to 1942—there is no evidence for earlier years—averaged $2,700 per year, including repairs. It would have cost the Government some $35,000 to place the ship in operating condition in 1942.

Her insured valuation in 1942 was $100,000; her scrap value $13,500. We do not know the reproduction cost at that time. Book value, figured at original cost less depreciation at one per cent for each of the first three years and four per cent per annum for the remaining period was $75,509.51. The earnings varied during the years she was operated by respondent. The average annual net operating income through December 31, 1920, was $17,216.28; both 1921 and 1922 operations found a deficit, while for the next five years net profit was at its highest level, averaging $129,893.92 per annum. 1928 and 1929 were progressively bad years and the next two and one-half years showed losses averaging $15,417.82 per year. In June 1932 the traffic was so poor that the vessel was docked and her operation never resumed. The Court of Claims found that the average annual net profit for the entire period of operation, ending in 1932, was $42,816.36, amounting to a return of 10.41 per cent per annum on the original investment.

3. *Sales of other vessels of like class on Great Lakes.*—After 1930, ships of the *Maitland* type were obsolete and not in demand as railroad car ferries on the Great Lakes. Construction of the "outer belt" railroad around the Chi-

cago yards and abolition of a rate differential made all-rail transportation, or movement on larger and more modern ferries, more practical for shippers.

But the Court found that in 1942 "there were a number of secondary uses for the vessel for which a demand did exist at that time" for use on the Great Lakes. Conversion to automobile ferry was relatively simple and economical; and the Court found that three sales of similar vessels had occurred from 1936 to 1940 for that use. The prices ranged from $25,000 to $65,000, but conversion and repair costs were greater because of the age and maintenance record of the vessels.

Two other vessels that were built from the same plans as the *Maitland* were sold for use on the Great Lakes in 1940 and 1942, for conversion as bulk carriers of pulpwood. Sale prices were $24,000 and $37,724.04, respectively. Neither of these vessels, however, was in the state of repair of the *Maitland*. One had been built in 1903, the other in 1910.

4. *Sales of vessels of like class for car ferrying on Atlantic Coast.*—While there was a finding that in "1942, there was a demand for a vessel such as the *Maitland No. 1* for use as a car ferry between Florida and Cuba," there was no finding that this "demand" had reflected itself in the Great Lakes market. The *Maitland* was not equipped to operate in salt water and it would have cost "not less than" $115,000 so to equip and move her to Florida, not including necessary strengthening for ocean service. There is no finding that respondent would have been able to sell the vessel had it been transported to Florida, nor that successful operation there was possible.

The Florida "demand" seems to have been predicated upon five sales of four vessels between 1941 and 1945. Only one ship, the *Grand Haven,* was sold while on the Great Lakes, and that was not until after hostilities ended in the last war. She was smaller but faster than the

Maitland, and brought a $50,000 price. She was floated down the Mississippi to the Gulf at "considerable expense." We know neither this amount nor the amount needed for repairs.

The other four sales were of vessels very similar to the *Maitland,* built between 1914 and 1920; but, unlike the *Grand Haven* and the *Maitland,* these ferries were operating on the Atlantic coast and were originally constructed for ocean travel. The sale prices were $100,000 and $170,000 for one vessel, the *Henry M. Flagler,*[1] and $332,500 each for the two others.[2] The latter two required about $20,000 each for repairs. All three vessels were "purchased" by the United States after requisition.

The Court of Claims, finding that "the property condemned" was "unique, . . . peculiarly situated" and without relative comparison on the Great Lakes, concluded that the *Maitland* was worth more than "the residual value of an obsolete car ferry," thus requiring resort to "a consideration of the earnings . . . , in conjunction with the contemporaneous transactions in vessels of close similarity in determining a fair value." It called "the average mean residual value of an obsolete car ferry" $50,000; "attributing this value to the *Maitland,*" the capitalized value of an annual income comparable to that of the *Maitland* for the sixteen years ending in 1932 was the figure of $389,767.15, "according to actuarial tables in evidence." The court then deducted the percentage difference between the life expectancy of the vessel in fresh and salt water (20%), the cost of conversion to salt water and sailing it to Florida, and the necessary

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[1] The first sale was in May 1941 to a private party who had thereafter spent $63,820 for necessary repairs. The second sale was on requisition, July 28, 1941, by the War Shipping Administration.

[2] These vessels, the *Joseph R. Parrott* and the *Estrada Palma,* were requisitioned by the War Shipping Administration in June, 1942.

repairs. Under this formula, $161,833.72 was the fair value "for its highest available and most profitable use for which it was adaptable at the time of its taking."

Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules. Suffice to say that the balance between the public's need and the claimant's loss has been struck, in most cases, by awarding the claimant the monetary "market value" of the property taken. See *United States* v. *Miller,* 317 U. S. 369, 374 (1943). Usually that is a practical standard; usually that approaches the "just" compensation demanded by the Fifth Amendment.

At times, however, peculiar circumstances may make it impossible to determine a "market value." There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is "no market" for the property in question. But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's property.[3] We simply must be wary that we give these sparse sales less weight than we accord "market" price, and take into consideration those special circumstances in other sales which would not have affected our hypothetical buyer. And it is here that other means of measuring value may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid.

We agree with the Court of Claims that in this case there was no Great Lakes "market" in the sense discussed above. We hardly think that five sales of dissimilar ves-

[3] Considerations which might affect our rulings in this case if the cause were tried to a jury need not concern us here.

sels require a finding that any one of the varying prices would have been repeated had the *Maitland* been offered for sale. And so we are in basic agreement with the court below that other measures of value may be relevant.

But there are few of these substitute standards which are in fact of assistance in assessing the value of the *Maitland*. Original cost is well termed the "false standard of the past" [4] where, as here, present market value in no way reflects that cost. So with reproduction cost, when no one would think of reproducing the property.[5] And past earnings are significant only when they tend to reflect future returns.[6] We see no relevance in the *Maitland's* earnings between 1916 and 1932 on the issue of capacity to earn after 1942, on the Great Lakes or elsewhere. On this record they are entirely too remote to bear on the vessel's value when taken. It follows that the Court of Claims' reliance upon earnings was error.

We have said that the absence of "market" price does not, *ipso facto,* rid isolated contemporaneous sales of all relevance. None of the evidence upon which the findings below were based is before us, but it seems likely that

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[4] E. Schmalenbach, Finanzierungen, pp. 4–6 (3d ed., Leipzig, 1922), quoted in 1 Bonbright, Valuation of Property 147, n. 9 (1937). "It is the property and not the cost of it that is protected by the Fifth Amendment." *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123 (1924). But see Bonbright, *supra,* ch. VIII.

[5] See 1 Report of Proceedings of the Advisory Board on Just Compensation 170 (United States Maritime Commission, War Shipping Administration, mimeographed, 1943). Cf. *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146 (1925); *The Hisko,* 54 F. 2d 540 (1931).

[6] See Orgel, Valuation Under Eminent Domain, ch. XIV (1936); 2 Nichols, Eminent Domain § 446 (2d ed. 1917); *The I. C. White,* 295 F. 593, 595, 596 (1924). As to the separation which must be made, in any case, between the value of the property and the value of the claimant's own business skill, see *Kimball Laundry Co.* v. *United States,* 338 U. S. 1 (1949).

the differences between the *Maitland* and ships sold on the Great Lakes between 1936 and 1942 may be calculated with some degree of accuracy. And the circumstances may indicate the relevance of the *Maitland's* insurance valuation. See Rule 3, Advisory Board on Just Compensation, 1943 A. M. C. 1443, 1444. But cf. *Westmoreland C. & C. Co.* v. *Public Service Comm'n,* 293 Pa. 326, 331, 142 A. 867, 869 (1928); Report of Proceedings of the Advisory Board, *supra,* pp. 152–153.

We have yet to consider the weight given to what the Court of Claims called Florida "demand." The question is whether Florida prices may be considered at all in determining value when the *Maitland* was taken on the Great Lakes.

Two cases in this Court, both involving the requisition of coal, have stated the rule that where "private property is taken for public use, and there is a market price prevailing at the time *and place* of the taking, that price is just compensation." *United States* v. *New River Collieries,* 262 U. S. 341, 344 (1923); *Davis* v. *Newton Coal Co.,* 267 U. S. 292, 301 (1925). (Emphasis supplied.) We have held that in this case there was no "market" on the Great Lakes; and so the quoted rule is in terms inapplicable. But neither can a Florida market be established on the evidence before us. And we have reminded the court below that it may consider individual sales for use on the Great Lakes for what bearing they may have upon the *Maitland's* value.

We take it that in the valuation of readily salable articles, price at the market nearest the taking is, at least in the usual case, a practical rule of thumb, and one that is most likely to place the claimant in the pecuniary position he occupied before the taking. Such considerations seem to underlie a similar result in the law of sales, and in the general law of damages. Thus, in *Grand Tower Co.* v. *Phillips,* 23 Wall. 471 (1874),

the plaintiff had planned to sell the defendant's coal at the best available market on the Mississippi between Cairo and New Orleans. Yet the defendant's breach of contract to sell to plaintiff brought a "more direct" measurement of damages: the nearest available market. See *Harris* v. *Panama R. Co.*, 58 N. Y. 660 (1874); 3 Williston, Sales §§ 599, 599e (Rev. ed. 1948), and cases cited.

But we do not think a similar rule practical or fair in the requisition of property which most owners would, if possible, sell without geographic restriction. We doubt, for example, that owners of ocean liners would, under ordinary circumstances, fail to negotiate beyond the port in which the vessels lay—whether or not ocean liners are "goods" and subject to the law of sales.[7] Were market conditions normal,[8] we could hardly call an award "just compensation" unless relevant foreign sales, in available markets, were considered. See Supplementary Rules 1 and 3, Advisory Board on Just Compensation, 1945 A. M. C. 1382, 1383; *Glaspy* v. *Cabot,* 135 Mass. 435 (1883).

The question is of course one of degree, and we do not mean to foreclose the consideration of each case upon its facts. *Olson* v. *United States,* 292 U. S. 246, 255 (1934), relied upon below, makes this clear. This Court there stated that the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use

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[7] See *Rivara* v. *Stewart & Co.*, 241 N. Y. 259, 264, 149 N. E. 851, 852 (1925), per Cardozo, J.; *Behnke* v. *Bede Shipping Co.* [1927] 1 K. B. 649. Cf. *Meering* v. *Duke,* 6 L. J. (o. s.) 211 (K. B. 1828) (Stamp Act).

[8] But see Report of Proceedings of the Advisory Board, note 5, *supra,* pp. 64–71.

affects the market value while the property is privately held." Mr. Justice Holmes had earlier warned that the prospective use may be considered "only so far as the public would have considered it"; the price was not to be "what a tribunal at a later date may think a purchaser would have been wise to give." *New York* v. *Sage,* 239 U. S. 57, 61 (1915).

On the record before us, the Court of Claims was in error in according weight to Florida values. Whether the problem is one of more profitable use or simply of a more advantageous price in a distant port, the burden is on the claimant [9] to show that it is likely that a prospective Florida buyer would have investigated the Great Lakes market and considered a ship like the *Maitland* while it was moored to its Ohio dock; or that the ordinary Great Lakes owner would have undergone the trouble and expense necessary to send his ship to Florida for a possible sale; or, finally, that either of these possibilities would have had an effect on price had the *Maitland* been sold on the Great Lakes. And the question is what the ordinary businessman in the trade would do, not what the owner claims he would do; a contrary rule would invite perjury, and would smack of the kind of special value which would not be considered by the ordinary purchaser. See *Grand Tower Co.* v. *Phillips, supra.*

A bare record reciting five sales, three to the United States, and but one on the Great Lakes for Florida use—and that after the war's end—does not meet the claimant's burden. But we leave the final question open for further consideration below. We do not mean to foreclose a finding, on substantial evidence not now before us, that there were probabilities of sale in Florida in 1942 sufficient to warrant consideration of demand there in fixing the

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[9] *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 273 (1943).

value of the *Maitland*. We may add that the Court is clearly not bound to accept any geographic price range at full value.

This record, however, justifies neither of the valuation measures adopted below. The judgment is reversed and the cause remanded for further proceedings in the light of this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

Even though I join the Court's opinion in its general direction, the treacherous nature of the subject matter makes appropriate a separate statement of views.

Resort to the conventional formulas for ascertaining just compensation for the taking of property rarely bought and sold, and having therefore no recognized market value, does not yield fruitful results. The variables are too many to permit of anything except an informed judgment. Everything, therefore, turns on the process of judgment to the end that judgment be not based on standards too difficult of application or evidence too tenuous for solid inference.

It is this Court's duty to lay down standards for application by the lower courts. But since we are concerned with ascertainment of rather elusive values, those whose primary duty it is to make these estimates ought not to be cramped by rules that are too rigid and too artificial. If the questions presented to this Court in a particular case really turn, as they do here, on the relevance of data and the reasonableness of the inferences drawn from them in arriving at just compensation, the training and experience of the fact-finders become important.

If a jury is to make the valuation the area within which speculation may in the nature of things roam at large should be as narrowly confined as possible. See *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 20. But when the valuer is a court and particularly the tribunal that consists of judges to whom may fairly be attributed the expertness that comes from frequent dealing with the more elusive problems of value, it seems desirable for this Court to allow such tribunal considerable freedom from hard and fast rules in determining what data are relevant and what significance may be drawn from them. Barring obviously wrong criteria, or findings baseless in proof, experience counsels empiricism in dealing with these problems. And empiricism suggests sailing as close to the record of a particular case as possible. Only thus shall we avoid abstract pronouncements bound to distort or to be distorted by the case-by-case adjudicatory process especially appropriate in problems of this nature. Either lip-service will be paid such formulas while decisions are rooted in considerations outside them, or formulas not fitting practical circumstances will achieve impractical results.

In the light of this general approach the case before the Court comes down to this:

1. The starting point of the computation by the Court of Claims of the amount to be awarded for the Government's taking of the *Maitland* was capitalization of its earnings between 1916 and 1932. While we do not have the evidence that was before the court below, its findings disclose no reasonable relation between such earnings and the value of the vessel in 1942, the year of the taking, whether for use on the Great Lakes or in Florida waters. To permit such data to serve as a springboard for judgment is to leave too much temptation for unbridled speculation even by experienced judges.

2. In these days of quick mobility both for persons and property it would be an unjustifiably artificial rule to confine the worth of mobile property, as was the *Maitland,* to place value. Of course if there was an active market for property to be condemned at about the time and place of the taking, evidence of demand for special uses, or at other places, would not be helpful in seeking the general value of the property as against some unusual salability of the property, unusual either by reason of location or as a matter of use. Such evidence of atypical demand should be excluded not because it has no logical relevance but because such practical significance as it has is already reflected in current market prices. But here it was found that there was in fact no market on the Great Lakes for vessels like the *Maitland,* and, since what the United States got had to be translated into dollars and cents, there is no reason in sense and therefore none in law for excluding from consideration that there was a demand for vessels such as the *Maitland* for use as a car ferry between Florida and Cuba.

3. But such evidence must be critically used. It is one thing to exclude such evidence of demand at a distant place to which the property was transferable and quite another to assume that a finding that in 1942 there was such a demand is proof positive that the *Maitland* would have found a market in Florida and to base valuation on such assumption. Particularly is this true when the court below found that it would have cost at least $115,000 to transport the *Maitland* to Florida waters and to outfit it for salt-water use. The amount of this expenditure is more than the arithmetic measure of the difference in value between a vessel located in Florida and one on the Great Lakes. The risk to a profitable venture that the $115,000 expenditure implies casts doubt on the likelihood of the *Maitland's* use in the Florida trade. For the

greater the risk the smaller the impact of the opportunities of the distant market. The short of the matter is that for its difficult task of valuing the Court of Claims should not be confined either to acceptance or rejection of the Florida demand *in toto*. Like most problems in the law it is a matter of degree.

4. This Court should not go beyond indicating the broad lines for adjudication by the Court of Claims, leaving to that court discretion appropriate to its experience in applying the indicated standards to the facts before it. The analysis we have outlined must be fitted to facts not now before us.[1] I am not prepared therefore to specify as a matter of law what number of logically relevant sales do or do not meet the claimant's burden. After the Court of Claims has made additional findings in the light of this Court's decision it will be time enough to consider whether the data before it are too tenuous to permit solid inferences from them, as set forth in appropriate findings, regarding the weight which the Court of Claims may accord to the Florida demand.

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[1] The evidence in this case could of course have been included in the record brought here under the Act of May 22, 1939, 53 Stat. 752, amending § 3 (b) of the Act of February 13, 1925, 43 Stat. 936, 939. See also Rule 41 of this Court.

WILMETTE PARK DISTRICT *v.* CAMPBELL, COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 75. Argued November 15–16, 1949.—Decided December 12, 1949.

Petitioner, an instrumentality of a State, operated on a non-profit basis a public bathing beach to which all persons entering were charged admission. For failure to collect and pay the tax imposed by § 1700 (a) of the Internal Revenue Code on charges for "admission to any place," penalties were assessed against petitioner under § 1718 of the Code. *Held:*

1. Having paid the penalties from its general revenue fund, petitioner's financial interest was sufficient to give it standing to sue for refund. P. 414.

2. Within the meaning of § 1700 (a), the charge made by petitioner for admission to the beach was an "amount paid for admission to any place," and that section was applicable. Pp. 414–419.

(a) Congress did not intend by § 1700 (a) to tax only admissions to "spectator entertainments." P. 415.

(b) The beach area here involved was a "place" within the meaning of § 1700 (a) (1). Pp. 415–416.

(c) Congress did not intend to exempt non-profit operations from the admissions tax imposed by § 1700 (a) of the Code, notwithstanding certain exemptions that had previously been allowed. P. 416.

(d) That activities conducted by a municipality were not intended to be exempt from the admissions tax is indicated by a long-continued administrative construction, expressly denying such exemption, which has been followed by repeated reenactment of the relevant language without change. Pp. 416–418.

(e) The fact that petitioner's beach patrons make use of a beach and its facilities, and that its admission charge may by local law be considered a "use tax," does not render § 1700 (a) inapplicable. Pp. 418–419.

3. The application of the admissions tax in connection with this activity of the petitioner, though an instrumentality of a State, does not violate the Federal Constitution. Pp. 419–420.

172 F. 2d 885, affirmed.

In a suit for refund of penalties assessed for failure to collect federal admissions tax, the District Court entered judgment for petitioner. 76 F. Supp. 924. The Court of Appeals reversed. 172 F. 2d 885. This Court granted certiorari. 337 U. S. 937. *Affirmed*, p. 420.

Henry J. Brandt argued the cause for petitioner. With him on the brief was *Gilbert H. Hennessey, Jr. Edward R. Johnston* was also of counsel.

Lee A. Jackson argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Melva M. Graney.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Section 1700 (a) (1) of the Internal Revenue Code, as amended, provides for the imposition, except as to certain classes of persons under circumstances not important here, of "A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription." [1] Paragraph (2) of the subsection declares that the tax "shall be paid by the person paying for such admission." And § 1715 requires that "Every person receiving any payments for admission . . . subject to the tax imposed by section 1700 . . . shall collect the amount thereof from the person making such payments."

This suit, brought to recover penalties paid by petitioner for noncollection of federal admissions tax, presents two questions for determination: Whether § 1700 (a) is applicable to paid admittances to a bathing beach operated without purpose of gain by a local park district of Illinois; and, if the Code provision is to be so inter-

[1] A war tax rate of 1 cent for each 5 cents or major fraction thereof has been in effect since April 1, 1944, pursuant to Revenue Act of 1943, § 302 (a). 58 Stat. 21, 61 (1944).

preted, whether the imposition of admissions tax in connection with such state activity is within the constitutional power of Congress.

Petitioner is Wilmette Park District, a body politic and corporate located within the Village of Wilmette, Cook County, Illinois. Organized and administered pursuant to Illinois statutes, the District includes within its jurisdiction four park areas. The largest, Washington Park, extends for approximately three-fourths of a mile along Lake Michigan and was acquired partly by grant from the State of Illinois, partly by purchase, and partly by exercise of the power of eminent domain. At the north end of Washington Park, petitioner has operated a public bathing beach during the summer months for many years, under authority conferred by the Illinois Legislature. The beach has been used primarily by residents of the District, but also has been open to nonresidents.

Among the facilities which the District provided at the beach during the period under review were a bath house, automobile parking area, life-saving equipment, flood lighting, drinking fountains, showers, spectator benches, bicycle racks, first aid, and supplies. The operation and maintenance of the area and its various services were solely by the District, which employed the necessary personnel.

Petitioner charged all persons for admittance to the beach. Its charges were of two types: a daily fee of fifty cents on weekdays and one dollar on Saturdays, Sundays and holidays, for which no ticket was issued; and a flat rate for a season ticket which could be purchased on an individual or family basis. These charges were made to cover the expense of maintenance and operation of the beach and of some capital improvements. Over the years the charges were intended merely to approximate these costs and not to produce net income or profit to petitioner; during the period 1940–1944 the accounts of the beach,

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maintained on a cash receipts and disbursements basis, reflected an excess of receipts over expenditures of $42.11.

In July 1941 the Collector notified petitioner to collect a tax of 10 per cent on all tickets to the beach sold on or after July 25 of that year. Petitioner had not previously collected such taxes, and it refused to do so after the Collector's notice. Subsequently the Commissioner under § 1718 of the Code assessed over petitioner's protest penalties in the amount of the tax which the Commissioner claimed should have been collected under § 1700 (a) from July 25, 1941 through 1945, plus interest and sums due under § 3655 (b) of the Code for failure to pay the tax on demand. These penalties amounted to $6,139.93 and were paid out of petitioner's general funds raised by property taxes.

Petitioner filed timely claims for refund which were rejected, and in 1946 brought this suit against the Collector. The District Court entered judgment for petitioner. 76 F. Supp. 924.[2] The Court of Appeals for the Seventh Circuit reversed. 172 F. 2d 885. Because the questions presented have importance in the administration of the admissions tax sections of the Code, we granted certiorari. 337 U. S. 937.

First. The Government raises no issue as to petitioner's standing to sue for refund. As recovery is here sought of penalties paid from petitioner's general revenue fund after its failure to collect the tax, we deem petitioner's financial interest clearly sufficient.[3]

Second. Section 1700 (a) is applicable if the charge made by petitioner for admittance to the beach was,

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[2] The District Court allowed recovery only of payments made since January 1, 1945, when respondent took office as Collector. These payments were based on petitioner's operations after October 1, 1941, through 1945. Prior to January 1, 1945, petitioner paid $57.20 on the basis of operations from July 25, 1941, to October 1, 1941.

[3] See 42 Ill. L. Rev. 818, 819–820 (1948).

within the meaning of the statutory language, an "amount paid for admission to any place."

The words of the provision when taken in their ordinary and familiar meaning reflect a legislative purpose of comprehensive application. By its terms the section embraces every payment made in order to secure admittance to a specific location. And this purpose of broad application is not less certain because of anything in the legislative history of the initial adoption of that language.[4] In this view it is unnecessary to consider whether petitioner's beach area can be distinguished from a "spectator entertainment," for we are unable to accept petitioner's argument that Congress intended in § 1700 (a) to tax only admissions to such events.[5]

We think it clear that a beach area may be a "place" in the sense of § 1700 (a) (1). Petitioner's beach park, including the adjacent shoal waters, was policed and

[4] The Report of the House Committee on Ways and Means relating to the War Revenue Act of 1917 "recommended that this tax be imposed upon all places to which admission is charged, such as motion-picture shows, theaters, circuses, entertainments, cabarets, ball games, athletic games, etc., but not upon admissions all the proceeds of which will go exclusively to the benefit of religious or charitable institutions or for agricultural purposes." H. R. Rep. No. 45, 65th Cong., 1st Sess. 8 (1917). See 55 Cong. Rec. 2148 (1917).

[5] In the admissions tax provisions of the Code, words restricting the imposition of tax to certain classes of places appear only in subsections other than (a) of § 1700. Section 1700 (b) imposes a tax of 11 per cent on the permanent use or lease of boxes or seats "in an opera house or any place of amusement"; such tax is in lieu of that provided for under § 1700 (a). Section 1700 (c) imposes on the sale outside box offices, of tickets to "theaters, operas, and other places of amusement" a tax of 11 per cent of the price in excess of the box office price; such tax is in addition to the tax imposed by § 1700 (a). Section 1700 (d) imposes a tax of 50 per cent on the amount of sales in excess of regular price by the management of "any opera house, theater, or other place of amusement." Section 1700 (e) imposes a tax of 5 per cent on amounts paid for admission, refreshment, service, or merchandise, "at any roof garden, cabaret, or other

lighted; the land area was defined, and entrance was through gates. A payment was made by patrons of the beach as the condition of admittance to a specific area with definite physical limits. Thus the fee which petitioner charged was "paid for admission" to a "place" as those terms are used in § 1700 (a) (1).[6]

We cannot agree with petitioner's suggestion that Congress intended to exempt from tax admissions to any activity not conducted for gain. Section 1701 of the Code did allow certain exemptions prior to their termination on October 1, 1941 pursuant to the Revenue Act of 1941, § 541 (b). 55 Stat. 687, 710. In § 1701 Congress exempted admissions to certain classes of events and admissions all the proceeds of which inured exclusively to the benefit of designated classes of persons or organizations. But since Congress did not exempt all activities not for profit as it readily might have done, it appears that admissions to such activities are not for that reason outside the admissions tax scheme. *Exmoor Country Club* v. *United States,* 119 F. 2d 961 (C. A. 7th Cir., 1941).

Nor is there greater force in petitioner's contention that the admissions tax was not intended to apply in the case of activities conducted by a municipality. In interpreting federal revenue measures expressed in terms of general application, this Court has ordinarily found them operative in the case of state activities even though States were not expressly indicated as subjects of tax. See concurring opinion in *New York* v. *United States,* 326 U. S. 572, 584 and n. 3 (1946). And in *Allen* v. *Regents of the Univer-*

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similar place furnishing a public performance for profit"; in such cases no tax may be imposed under § 1700 (a).

Compare *Exmoor Country Club* v. *United States,* 119 F. 2d 961 (C. A. 7th Cir., 1941); *Twin Falls Natatorium* v. *United States,* 22 F. 2d 308 (D. Idaho, 1927); *United States* v. *Koller,* 287 F. 418 (W. D. Wash., 1921).

[6] Accord: *Dashow* v. *Harrison,* 1946 P–H ¶72,405 (N. D. Ill., 1946).

sity System of Georgia, 304 U. S. 439 (1938), it was decided that the admissions tax law was applicable in connection with activities carried on by an agency of a State, although it does not appear that the issue of legislative purpose was there disputed. However, we are unable to discover that there has been any design to exempt admissions to municipally conducted activities.[7] We regard the interpretative issue as controlled by a long-continued administrative construction, expressly denying such exemption,[8] which has been followed by repeated reenact-

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[7] Although an exemption was allowed by § 1701 of the Internal Revenue Code prior to October 1, 1941, of "admissions all the proceeds of which inure . . . exclusively to the benefit of . . . societies or organizations conducted for the sole purpose . . . of improving any city, town, village, or other municipality," we need not determine whether the exemption was properly interpreted as inapplicable to activities conducted by a municipal corporation. See Treas. Reg. 43 (1928 ed.) Art. 22; *id.* (1932 ed.) Art. 22; *id.* (1940 ed.) § 101.25. The provision became inapplicable prior to the period for which petitioner made payments which could be recovered against the present respondent. See note 2, *supra.*

Petitioner has argued that the specific exemption benefiting municipal improvement societies was intended to afford them the same exemption which Congress thought applied to municipal corporations; thus, it is urged, repeal of the societies' exemption still would leave the exemption in the case of municipally conducted activities. If Congress assumed that any such municipal corporation exemption existed by implication, it seems likely that it did so because of constitutional considerations which we notice hereafter and not because of a belief or purpose that the tax was not applicable to activities conducted by any public agency. Thus Congress, in adopting 49 Stat. 1757, 1792 (1936) and 55 Stat. 303, 350 (1941), apparently assumed that an express exemption was necessary in order to withdraw admissions to National Parks from the tax statute. Cf. 55 Stat. 687, 710 (1941), terminating such exemptions of park admissions.

[8] Treas. Reg. 43 (1919 ed., Part 1) Art. 42; *id.* (1921 ed., Part 1) Art. 42; *id.* (1922 ed., Part 1) Art. 26; *id.* (1924 ed., Part 1) Art. 26; *id.* (1926 ed., Part 1) Art. 26; *id.* (1928 ed.) Art. 24; *id.* (1932 ed.) Art. 24; *id.* (1940 ed.) § 101.27; *id.* (1941 ed.) § 101.16.

ment of the relevant language without change.[9] Cf. *Helvering* v. *Winmill*, 305 U. S. 79 (1938).

Finally, § 1700 (a) (1) is not rendered inapplicable because beach patrons make use of a beach and its facilities, thus affording characterization of the admission fee as a "use charge." Few if any admissions taxable under § 1700 (a) are not accompanied by a use of the property or equipment to which the admittee's license extends. Although table accommodations for which a charge is made are usually thought of as objects of a patron's use, yet Congress in § 1704 of the Code has declared that for purposes of the admissions tax law a charge for their use must be treated as a charge for admission and not as a rental charge. A similar result must obtain when payment is prerequisite, as it was at petitioner's beach, to both admission to and use of a specific area. *Chimney Rock Co.* v. *United States*, 63 Ct. Cl. 660 (1927), cert. denied, 275 U. S. 552 (1927); *Twin Falls Natatorium* v. *United States*, 22 F. 2d 308 (D. Idaho, 1927).[10]

The trial court, in allowing judgment for petitioner in view of the use made of the beach, considered the fee a "use tax." But if there is no tax exemption for admissions to a municipally conducted activity, then a municipality may not escape tax by claiming that its admission fee is a "use tax" when a similar private business could not advance such claim. Nor does it matter that petitioner's authority to make any charge to beach patrons

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[9] Revenue Act of 1918, § 800, 40 Stat. 1057, 1120; Revenue Act of 1921, § 800, 42 Stat. 227, 289; Revenue Act of 1924, § 500, 43 Stat. 253, 320; Revenue Act of 1926, § 500, 44 Stat. 9, 91; Revenue Act of 1928, § 411, 45 Stat. 791, 863; Revenue Act of 1932, § 711, 47 Stat. 169, 271; Pub. Res. No. 36, June 28, 1935, 49 Stat. 431; I. R. C. §§ 1700, 1701 (1939); Revenue Act of 1941, § 541, 55 Stat. 687, 710.

[10] See *Huguenot Yacht Club* v. *United States*, 32 F. Supp. 387, 388 (S. D. N. Y., 1940); Lent, The Admissions Tax, 1 Nat. Tax J. 31, 35–36 (1948); 61 Harv. L. Rev. 894 (1948).

is derived from a statute which contemplates a charge for "use." Ill. Rev. Stat., c. 105, § 8–7d (1947). The application of the federal admissions tax statute is not controlled by the characterization of petitioner's fee by local law. Cf. *Morgan* v. *Commissioner,* 309 U. S. 78, 81 (1940).

We conclude that § 1700 (a) is applicable.

Third. The constitutionality of admissions tax levied in connection with an activity of a state instrumentality was before this Court in *Allen* v. *Regents of the University System of Georgia,* 304 U. S. 439 (1938). We there found no constitutional inhibition against a nondiscriminatory imposition of such tax on admissions to an athletic exhibition conducted in connection with a state educational administration and in the performance of a governmental function.

The *Allen* decision followed soon after *Helvering* v. *Gerhardt,* 304 U. S. 405 (1938), which declared two principles limiting state immunity from federal taxation. *Id.* at 419. The first of these, invoked in the *Allen* decision, was dependent upon the nature of the function being performed by the state agency and excluded from immunity such activities as might be thought not essential for the preservation of state government. We need not consider here the applicability of that doctrine, for the petitioner's assertion of immunity must be rejected on the second restrictive principle reaffirmed in the *Gerhardt* decision. This "principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government." 304 U. S. at 419–420. According to this principle, the State "is not necessarily protected from a tax which well may be sub-

stantially or entirely absorbed by private persons." *Id.* at 420.

While the *Allen* decision assumed that the admissions tax there imposed was a direct burden on the State, that assumption was required only for the purpose of considering the first principle of limitation of immunity as formulated in the *Gerhardt* case. Such an assumption need not be made here. It is true, of course, that unless there is a shift in demand for admissions to petitioner's beach, imposition of the tax may to an undeterminable extent adversely affect the volume of admissions.[11] Insofar as this occurs, the services of the District will be less widely available and its revenues from beach admissions will be reduced. But admissions tax, which is "paid by the person paying for such admission," is so imposed as to facilitate absorption by patrons of the beach rather than by the District, and we have no evidence that the District will be forced to absorb the tax in order to maintain the volume of its revenues and the availability of its benefits. Cf. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 526 (1926). "The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power." *Helvering* v. *Gerhardt, supra,* 304 U. S. at 422.

As it follows that there is no constitutional objection to the tax penalties assessed against petitioner, the decision of the Court of Appeals must be

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consideration or decision of this case.

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[11] See Lent, note 10, *supra,* at 40–42.

ALCOA STEAMSHIP CO., INC. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 271. Argued November 16, 1949.—Decided December 19, 1949.

Government property which was being carried by sea under a standard form government bill of lading was lost by enemy action before reaching its destination. The government bill of lading provided that, "unless otherwise specifically provided or otherwise stated hereon," the shipment would be governed by the rules and conditions applicable to commercial shipments; but payment was conditioned on presentation of the bill of lading "properly accomplished" and of a "freight voucher prepared on the authorized Government form." A "goods or vessel lost or not lost" provision in the carrier's commercial bill of lading would have entitled the carrier to payment of the freight had the shipment been a commercial one. *Held:* The terms of the government bill of lading, considered with provisions of the required voucher, were inconsistent with the "goods or vessel lost or not lost" provision, and the United States was not liable for the freight on the lost property. Pp. 422–429.

175 F. 2d 661, affirmed.

In a suit against the United States under the Tucker Act, now 28 U. S. C. § 1346, to recover a sum alleged to have been due under a contract of affreightment, the District Court gave judgment for the claimant. 80 F. Supp. 158. The Court of Appeals reversed. 175 F. 2d 661. This Court granted certiorari. 338 U. S. 813. *Affirmed,* p. 429.

Melville J. France argued the cause and filed a brief for petitioner.

Samuel D. Slade argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Joseph W. Bishop.*

Briefs of *amici curiae* urging reversal were filed by *L. de Grove Potter* and *Clement C. Rinehart* for the Waterman Steamship Corporation, and by *Harold S. Deming* for the Stockard Steamship Corporation.

MR. JUSTICE REED delivered the opinion of the Court.

It is a principle of American maritime law that ocean carrier freight charges are not earned unless and until the goods are delivered to destination.[1] But contractual provisions establishing the shipper's liability for freight regardless of actual delivery have been uniformly held valid,[2] and have become common stipulations in carriers' bills of lading. Shipments of government property are made subject to the conditions of the carrier's usual contract of carriage unless the government standard form bill of lading specifically provides otherwise.[3] At bar is the single question of contract interpretation whether a carrier's "Goods or Vessel lost or not lost" provision survives the terms of the government standard form bill of lading. Has the government bill provided against liability for freight charges on public goods lost at sea?

On June 13, 1942, petitioner's ship, S. S. *Gunvor,* shipped a cargo of lumber at Mobile, Alabama, bound for Trinidad under a government form bill of lading. On her first day out she was torpedoed by enemy submarine. Ship and cargo were a total loss. In spite of

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[1] See, *e. g., Brittan* v. *Barnaby,* 21 How. 527, 533; *Caze & Richaud* v. *Baltimore Ins. Co.,* 7 Cranch 358, 362; Robinson, Admiralty, § 82 (1939); Borchard, *The Earning of Freight on Uncompleted Voyages,* 30 Yale L. J. 362 (1921).

[2] *E. g., International Paper Co.* v. *The Gracie D. Chambers,* 248 U. S. 387; *Allanwilde Transport Corp.* v. *Vacuum Oil Co.,* 248 U. S. 377.

[3] Government Bill of Lading, Standard Form 1058, approved by the Comptroller General, August 24, 1928; 8 Comp. Gen. 698; "Condition 2" quoted p. 424 *infra.*

the carrier's failure to deliver the shipment, the bill of lading was surrendered to it, and its claim for freight on the lost cargo was paid by the War Department on September 15, 1942. On audit, however, the Comptroller General disallowed the payment on the ground that the freight had not been earned, and the sum was offset against other claims admittedly owing to petitioner. Petitioner instituted this suit under the Tucker Act in the United States District Court for the Southern District of New York to recover the freight claimed. The case in no way concerns liability for the value of the cargo lost. Reversing the conclusion of the District Court, the Court of Appeals for the Second Circuit found in the provisions of the standard government form bill of lading a "carefully devised plan" to pay freight charges only if the shipment actually arrives at destination.[4] We granted certiorari because determination of the issue raised here will guide adjustment of a large body of similar claims now pending. 338 U. S. 813.

Review of existing case law and prevailing commercial usage respecting the earning of freight provides no assistance in solving the narrow problem raised by the specific contract now before us. Further, in view of our conclusion in the case, we need not decide whether we may properly consider the Government's extensive argument regarding past administrative practice, nor rule upon its relevance or weight. As to petitioner's citation to two instances where, allegedly, claims similar to this were honored by the Comptroller General, we agree with the court below that a case of consistent administrative practice has not been made out, if indeed such practice is a relevant consideration. We therefore deal only with the bare words of the contract.

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[4] 175 F. 2d 661, 663.

A brief statement of the general scheme of payment of carrier charges under the government bill of lading will facilitate discussion of the niceties in the draftsmanship. The standard form bill of lading is filled out by the consignor at the time of shipment, signed by the carrier's agent and transmitted to the consignee. The consignee, upon receipt of the goods shipped, endorses the consignee's certificate printed on the bill and hands the bill over to the carrier. The carrier then submits to the appropriate agency the endorsed bill and a standard form government voucher in support of its claim for the freight charges. Setting forth the details of this disbursing machinery, there are printed on the reverse of the bill of lading "General Conditions and Instructions," clearly referred to upon the face of the bill.[5]

"Condition 2" of the government bill provides the initial basis for the controversy here:

> "Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

Clause 6 of petitioner's bill of lading provides that:

> "Full freight to destination . . . and all advance charges against the Goods are due and payable . . . as soon as the Goods are received for purposes of transportation; . . . Goods or Vessel lost or not lost . . . ."

It is therefore conceded by all parties that under these two quoted provisions, the United States is obligated to pay freight on the lost *Gunvor* cargo unless the terms of the government bill "specifically" negative the carrier's provision. With due regard to the principle of

[5] Also printed on the back of the bill are a series of "Administrative Directions" and a form for "Report of Loss, Damage, or Shrinkage."

strict construction against the draftsman of a contract, we have concluded that the terms of the government bill of lading are inconsistent with petitioner's Clause 6, and that the United States is not liable for freight on this lost public property.

Occupying first place among the "Conditions" to the bill, and central to the issue here, is the payment provision.

> "1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made . . . ."

The simple provision against "prepayment" does not, we think, force the conclusion that freight will be paid only on delivered goods. This clause seems to us not to forbid accrual of the freight charge obligation in advance of delivery, but only to prohibit payment in advance.[6] But it does seem clear that the second sentence of "Condition 1" expressly conditions payment upon submission of two documents, the bill of lading "properly accomplished," and a freight voucher prepared on the authorized government form. If the carrier is put on express notice that fulfillment of either of these conditions posits actual delivery of the cargo, petitioner's "lost or not lost" provision must be held vitiated. In fact, both specifically contemplate actual delivery.

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[6] The provision was required by law. For more than a century it had been the expressed legislative will that "no advance of public money shall be made in any case whatever . . . ." 3 Stat. 723. The Government interprets a further provision of this statute that ". . . payment shall not exeed [exceed] the value of the service rendered . . ." to resolve the issue at bar in its favor. Like the court below, we find it unnecessary to pass upon this contention.

I.

It is petitioner's construction that the bill of lading condition has been fully satisfied. "Accomplishment" he argues to be a technical term of ancient use in the law of the sea signifying no more than surrender of the bill to the carrier by the consignee or other authorized holder. This may be conceded immediately, and indeed the government bill seems to imply this usage where the term is used alone. But in this one provision on the bill the term is not used alone. Payment is not conditioned upon submission of an "accomplished" bill of lading; the bill must be "properly accomplished." [7] Unless the modifier be held to mean nothing, it can only be inferred that more than bare "accomplishment" is contemplated. The requisites to a "properly accomplished" bill are specifically set forth. We italicize the pertinent words.

Reference to "Instruction 2" informs the carrier that:

> "The consignee *on receipt of the shipment* will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading *then* becomes *the* evidence upon which settlement for the service will be made."

This consignee's certificate, printed on the face of the bill, is denominated a "Certificate of *Delivery*," and is introduced by the words:

> "I have this day *received* . . . the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof."

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[7] The only other use of the modifier significantly appears in the parallel provision on the reverse of the voucher. Voucher Instruction 1 reads: "Payment . . . will be made . . . upon this voucher form, accompanied by the corresponding bills of lading, *properly* receipted; . . . ." (Italics supplied.)

"Condition 6" recites that:

> "*Receipt* of the shipment is made subject to the 'Report of Loss, Damage, or Shrinkage' noted hereon."

and "Instruction 6" calls for notation of all loss or damage before accomplishment if possible. In sum, "the" evidence upon which the carrier may rely for payment is the "accomplished," or surrendered, bill of lading, accompanied by the "Certificate of Delivery" signed "on receipt of the shipment," with the "receipt" subject to the loss or damage report.

The entries made in the situation at bar are those that could be anticipated from the terms of the bill. The consignee's Certificate of Delivery is endorsed only: "s. s. 'Gunvor' has been lost due to enemy action. . . . For the Acting District Engineer [signature illegible] Superintendent, August 8, 1942." The indicated spaces on the form were not filled in, nor was any entry made in the "Report of Loss, Damage, or Shrinkage." We do not, of course, suggest that the particular entries made on this bill determine the contractual issue, but it seems inescapable that the entry was made entirely for the record in explanation of the failure of the lumber to arrive. Without receipt of the goods, the bill was not, and could not have been, filled in under the strict terms of the standard form which we have stressed, so as to be "properly accomplished" for purposes of payment to the carrier.

II.

By the terms of "Condition 1" of the bill of lading, payment is further conditioned upon submission of the authorized government form voucher, a separate document.[8] On the reverse of this voucher form are "Instruc-

[8] Standard Form 1068, approved by the Comptroller General, June 26, 1931; 10 Comp. Gen. 588. All claims against the Government for freight or express charges must be made upon this standard voucher.

tions to Carriers," referred to on the face of the voucher. In these voucher "Instructions" appears in unequivocal language, statement of the Government's position that it shall not be held liable for freight on undelivered goods. "Instruction 6" reads explicitly:

> "Payment for transportation charge will be made only for the quantity of stores delivered at destination . . . ." [9]

We think of but one argument which can be advanced against the conclusiveness of this clause. "Condition 2" on the bill of lading invokes the usual commercial contract terms "unless otherwise specifically provided or otherwise stated hereon"; it is arguable that "hereon" does not mean "thereon," and that consequently the clear provision of the voucher forbidding payment for non-delivered goods cannot be considered. But, assuming for argument that no reliance may be placed upon the further condition that the bill of lading be "properly accomplished," this reasoning leads to the anomalous conclusion that (1) under the piece of paper labeled "bill of lading" freight is "earned" though the goods are not delivered; but (2) payment will be made only on a voucher, which expressly denies the right to payment for undelivered goods. Such a construction yields an accrued obligation, without means of collection. We think it more reasonable to accept the available alternative reading, and hold that the words in "Condition 2" "otherwise stated hereon" are satisfied by the express reference on

[9] The balance of the sentence is not relevant here. It reads: ". . . except that in case of loss of weight from natural shrinkage en route *and* weight shipped, as shown by the bill of lading, will be paid for, provided packages are delivered intact." The syntax of this exception clause is destroyed by the conjunction in italics. Reference to the official copy at 10 Comp. Gen. 589 shows that "and" is a printer's error. The correct word is "the".

the bill to the standard voucher and the specific conditioning of payment upon submission of that voucher.

To hold petitioner to the terms of the voucher comports with practicalities. The intent of the Government to condition payment upon delivery we think abundantly clear, and the basic question is whether the Government's draftsmanship succeeds in giving unequivocal notice of this stipulation. The bill expressly summons attention to the voucher; the provision on the voucher is unmistakable. An experienced carrier could not have been unfamiliar with the express terms of a document which it uses regularly, a prescribed document upon which every claim against one of its largest customers must be made.

Since it seems to us that the bill of lading's specific conditions for payment can only be satisfied upon delivery of the shipment to destination, we hold the terms of the government bill to be inconsistent with petitioner's "Goods or Vessel lost or not lost" provision. The decision below is correct, and is

Affirmed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON dissent on the grounds expressed below in the opinion of Judge Augustus N. Hand. 175 F. 2d 661, 663.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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CARTER *v.* ATLANTA & ST. ANDREWS BAY RAILWAY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 23. Argued October 14, 1949.—Decided December 19, 1949.

In this action under the Federal Employers' Liability Act and the Safety Appliance Act, based upon a charge of negligence and a charge of a violation of the Safety Appliance Act through the failure of an automatic coupler, *held:*

1. It was error to take from the jury the phase of the case involving the alleged violation of the Safety Appliance Act, since there was evidence upon which a jury could find a causal relation between the failure of the coupler and the plaintiff's injury. Pp. 433–435.

(a) The duty imposed on an interstate railroad by the Safety Appliance Act to equip cars "with couplers coupling automatically by impact" is an absolute duty unrelated to negligence, and the absence of a "defect" cannot aid the railroad if the coupler was properly set and failed to couple. Pp. 433–434.

(b) The fact that the coupler functioned properly on other occasions is immaterial. P. 434.

(c) Once a violation of the Safety Appliance Act is established, only causal relation is in issue, since violation of that Act supplies the wrongful act necessary to ground liability under the Federal Employers' Liability Act, regardless of negligence. P. 434.

(d) If the jury determines that defendant's violation of the Safety Appliance Act is "a contributory proximate cause" of the injury, it may find for plaintiff. P. 435.

2. In an action under the Federal Employers' Liability Act based on general negligence, contributory negligence does not bar recovery but affects only the amount of damages recoverable; and the trial court's instructions to the jury on this issue in this case were erroneous and were prejudicial to the plaintiff. Pp. 435–437.

170 F. 2d 719, reversed.

In an action under the Federal Employers' Liability Act, there was a verdict against plaintiff upon which the Federal District Court entered judgment for defendant. The Court of Appeals affirmed. 170 F. 2d 719. This Court granted certiorari. 336 U. S. 935. *Reversed,* p. 437.

J. Kirkman Jackson argued the cause and filed a brief for petitioner.

B. D. Murphy argued the cause for respondent. With him on the brief was *James N. Frazer.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The Federal Safety Appliance Acts require railroad cars used in interstate commerce to be equipped with couplers coupling automatically by impact.[1] This case brings before us for review another action for damages by a railroad employee under the Safety Appliance Acts and the Federal Employers' Liability Act.[2] The trial court instructed the jury that there could be no liability based on any "defect" in the "automatic coupling system," but submitted the case on issues of negligence. There was a verdict against the plaintiff upon which judgment for the railroad was entered. The Court of Appeals affirmed. 170 F. 2d 719. We granted certiorari because of the confusion which has developed in the application of the two statutes. 336 U. S. 935. Our duty to review certain cases of this nature is settled. *Wilkerson* v. *McCarthy,* 336 U. S. 53 (1949); *Keeton* v. *Thompson,* 326 U. S. 689 (1945); *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649 (1947).

On February 2, 1946, the petitioner was injured while acting as "swing man" of a switching crew on the respondent railroad. The crew of five men were engaged at night in switching operations at and near the International Paper Company plant in Panama City, Florida.

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[1] "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 27 Stat. 531, 45 U. S. C. § 2.

[2] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–59.

The conductor of the crew had laid out a plan for coupling together a number of cars, some of which were on storage tracks and one on the main line. The ultimate objective was to switch some wood rack cars loaded with pulpwood into the wood yard of the paper concern. In the conductor's absence petitioner was in charge of the switching operations and attempted to carry out the instructions given him.

The engine, after coupling in front of it a box car followed by eight flat cars, was engaged in backing the train of cars onto the main line, in order to couple, at the end of the train, a Louisville & Nashville Railroad wood rack car loaded with pulpwood. The petitioner had previously set the brake and had opened both lips of the coupler on the L. & N. car preparatory to attaching the car to the train. He had given the footboard man the slow signal ahead for coupling, which had been passed on to the engineer. The engineer brought the train forward and hit the L. & N. car in the usual manner necessary for coupling, but instead of coupling to the train the L. & N. car started rolling down the tracks, which were, at this point, on a downgrade.

Petitioner saw that the L. & N. car had not coupled and ran after it for some fifty or sixty feet, climbed to the bulkhead where the brake wheel was located, and applied the hand brake to stop the car. He was able to bring the car to a stop only after it had left the main line and traveled around a curve for some six car lengths. Looking up, he saw the train moving toward him about twenty feet away at a speed which conflicting testimony places at a maximum of fifteen miles per hour to a minimum of two miles per hour. Petitioner grabbed the brake wheel to brace himself, but the train hit the L. & N. car so violently that it threw the petitioner about six feet down into its hold. This time the coupling was successful, and as the L. & N. car jerked from the impact some

of the pulpwood loaded in the car was pitched forward on the petitioner, causing the alleged injuries.

The engineer testified that he did not know whether the L. & N. car had safely coupled at the first impact. He contended that after this impact, he received the come-ahead signal from the petitioner, whereupon he moved the train forward at about six miles per hour. The testimony was in sharp conflict with reference to this signal, as well as to other details of the incident.

Defendant moved for a directed verdict as to the failure to couple on the ground that while the coupler failed to couple on the initial impact, "it worked previously and worked subsequently, and the proof shows no defect in it; and under the finding in Western & Atlantic Railroad Company vs. Gentile, 198 S. E. 257, that this rule of law is laid down . . . that the failure of couplers to couple automatically by impact is not per se a violation of this Act . . . ." The District Court granted the motion, instructing the jury "that there is no evidence in this case . . . from which you could properly find there was defect in this . . . automatic coupling system on that car." The Court of Appeals affirmed on another theory: that the failure to couple on the first impact "was the remote, not the proximate, cause of plaintiff's injuries."

The trial court did submit the cause on the more general negligence allegations, and on these a verdict was returned for the respondent. But petitioner objects to those portions of the trial court's charge covering contributory negligence. The Court of Appeals admitted that standing alone, the charge "might possibly have been prejudicial," but stated that here it was "inconsequential."

In these conclusions the court below was in error.

First. Since 1893 the Congress has made it unlawful for a railroad company such as respondent to use any car on its line "not equipped with couplers coupling automatically by impact." This Court has repeatedly attempted

to make clear that this is an absolute duty unrelated to negligence, and that the absence of a "defect" cannot aid the railroad if the coupler was properly set [3] and failed to couple on the occasion in question. See *O'Donnell* v. *Elgin, Joliet & Eastern R. Co.*, 338 U. S. 384, 390 (1949), and cases cited. The fact that the coupler functioned properly on other occasions is immaterial.

But respondent contends that when the L. & N. car came to rest after the failure of the coupler "its capacity for doing harm was spent." The second movement, it argues, in which the coupling worked perfectly, started a new chain of events resulting in Carter's injury.

We cannot agree that the various events were so divisible. This was a two-pronged complaint, alleging the right to recover under the Safety Appliance Act and the Federal Employers' Liability Act. In this situation the test of causal relation stated in the Employers' Liability Act is applicable, the violation of the Appliance Act supplying the wrongful act necessary to ground liability under the F. E. L. A. See *Moore* v. *Chesapeake & Ohio R. Co.*, 291 U. S. 205, 216 (1934); *O'Donnell* v. *Elgin, Joliet & Eastern R. Co., supra; Coray* v. *Southern Pacific Co.*, 335 U. S. 520 (1949). Sometimes that violation is described as "negligence per se," H. R. Rep. No. 1386, 60th Cong., 1st Sess., p. 6; *San Antonio & A. P. R. Co.* v. *Wagner*, 241 U. S. 476, 484 (1916); but we have made clear in the *O'Donnell* case that that term is a confusing label for what is simply a violation of an absolute duty.

Once the violation is established, only causal relation is in issue. And Congress has directed liability if the

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[3] See *Myers* v. *Reading Co.*, 331 U. S. 477, 483 (1947).

Respondent conceded, in opposing certiorari, that "the Safety Appliance Act was violated— . . . a coupling failed to couple on impact . . . ." That statement is apparently abandoned now, for the argument is that Carter set the coupler improperly. On the record before us it is clear that that is a jury question.

injury resulted "in whole or in part" from defendant's negligence or its violation of the Safety Appliance Act. We made clear in *Coray* v. *Southern Pacific Co., supra,* 335 U. S. at 523, that if the jury determines that the defendant's breach is "a contributory proximate cause" of injury, it may find for the plaintiff. See also *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 333 (1918); *Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497, 510 (1916).

Certainly there was evidence upon which a jury could find a causal relation between the failure to couple, the action of petitioner in running and stopping the rolling car, the engineer's justified assumption that the car had coupled when in fact it had failed to do so, and the continued movement of the train into the standing car, thus causing injury. See *Louisville & Nashville R. Co.* v. *Layton,* 243 U. S. 617 (1917); *Erie R. Co.* v. *Caldwell,* 264 F. 947 (1920). It was error to take this phase of the case from the jury.

Second. In ruling on petitioner's general negligence allegations the trial court fell into errors in its charge on contributory negligence [4] which occur so frequently that we will discuss them briefly. The charge is replete with phrases such as, "if you should find his [the petitioner's] own negligence was the proximate cause of whatever injury followed," the verdict must be for the respondent. With proper explanations, the court could have advised the jury that if petitioner's own negligence was the *sole* proximate cause of his injury, the verdict must be for respondent; but here the court again and again used such

[4] Our ruling here, of course, is directed at the trial court's charge on the petitioner's general negligence allegations. In violations of the Safety Appliance Act, no employee "shall be held to have been guilty of contributory negligence . . . ," 45 U. S. C. § 53, even for purposes of jury comparison. See *Coray* v. *Southern Pacific Co., supra.*

phrases as "if you should find his injury was directly or proximately caused by his own negligence," verdict must be for the railroad; and if you find "that his own negligence in no manner contributed to his injury"; "if you find . . . he was not negligent in any manner," the verdict must be for the plaintiff. We are unable to say such error was inconsequential. It violates the direct command of the Act of Congress. The "fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ." 35 Stat. 66, 45 U. S. C. § 53.[5] The negligence of the petitioner and that of the railroad should have been submitted to the

[5] Respondent argues that the Court remedied these errors after the oral charge had been given. We see no basis for that conclusion; the Court's action at that time was equivocal at best. The record recites the following:

"Mr. Pettus: Your Honor said if the plaintiff negligently caused his own injury, he could not recover. If the plaintiff by his negligence proximately caused his injury, he couldn't recover. Your Honor omitted 'sole'. In other words, if the plaintiff's negligence were the sole proximate cause, of course he couldn't recover.

"The Court: I will modify it to that extent. That simply means whether his own negligence was wholly responsible for his injury. If he is totally responsible, it would not make any difference as to negligence on the other side. . . .

"Mr. Pettus: We except to that latter part of your Honor's charge, 'would not make any difference on the other side.' We except to your Honor's charge that there was no defect in the hand brake, and also that portion of your Honor's charge that the plaintiff negligently set the hand brake, automatic coupling, and that was the proximate cause, without limiting it and saying it was the sole cause. In other words, was the proximate cause and not the sole cause. And then when your Honor was reading a written charge you said, in explanation, 'if the direct or proximate cause of plaintiff's own negligence,' and we except to that on the ground you did not say it must be the sole cause. We asked you an explanatory charge on that rule, if

jury, and in the light of this comparison a verdict reached that would do justice to all concerned. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 65 (1943).

The judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE REED dissents. In his view the failure of the automatic coupler to fasten on the first impact was not a proximate cause of the injury to petitioner. The failure did not contribute to the injury. That was caused by a too rapid coupling on the second effort.

Any deficiency in the instructions on negligence was cured by the court's modification of the instruction set out in note 5 of the opinion.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER.

Properly deeming industrial injuries inherently incidental to the conduct of modern industry, the law throughout the United States deals with them as such on the principle of insurance, not on the principle of negligence. The workmen's compensation laws thereby eliminated all the inevitably casuistic efforts to apply the concepts of "negligence," "proximate cause" and "contributory negligence" which served well enough employer-employee relations which have long since ceased. To apply the concepts of "negligence" and "proximate cause"

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your Honor will give it at this time. I think your Honor overlooked charging it. If you will look at the rule.

"The Court: I think I will refuse this charge.

"Mr. Pettus: Refuse it?

"The Court: Yes. Give you an exception."

to the infinite complexities of modern industry is like catching butterflies without a net. But as to injuries suffered by railroad employees, courts and juries must continue to apply these concepts so long as the anachronistic Federal Employers' Liability Act remains.

Happily, however, Congress has not said that all the casuistries about "proximate cause" must be adjudicated by three courts. As an indispensable requirement of the functioning of this Court, Congress has left it to our discretion to decide whether, after a District Court and a Court of Appeals or two courts of a State have wrestled with the phantoms of proximate cause, this Court should have another go at it. A law by which injuries sustained by railroad employees in the course of their employment are compensated on the basis of negligence is bound to work injustice, and hardships in particular situations naturally present humane opportunities for alleviation. But no amount of stretching of negligence concepts can change the Act's character and the mischief that it does as a cruel survival of a by-gone era. And it is inconsistent with the functions of this Court to yield to such temptations by taking cases in which a conscientious appellate court felt compelled to decide against a railroad employee on its justifiable application of the dubious requirements of negligence, even though a contrary view might also be taken. Where a case involves no general principle requiring pronouncement but merely its own unique circumstances, such alleviation is inconsistent with the criteria, set forth in Rule 38, governing this Court's discretion in granting a writ of certiorari.

The argument at the bar of this Court and the opinions dealing with the merits leave no room for doubt that no general principle is here involved. There is merely a difference in the application of professedly settled rules

to the circumstances of this particular case. Three experienced judges of the Court of Appeals have found no error in the judgment that was rendered for the defendant. The division in this Court underlines the fact that the three judges below could not unreasonably have entertained the view they did. I am not remotely suggesting that this Court has not reached the right result, if it had to deal with the merits. For me it is decisive that, since the merits involve merely evaluation of the unique facts in the record, the case does not fall within the proper business of the Court.

I would therefore dismiss the writ as improvidently granted. By not doing so, the Court encourages petitions of this character instead of discouraging them. The Court should save its energy for cases it necessarily must adjudicate in order to adjudicate them with due regard for the needs of the deliberative process. The only effective way to respect these considerations is to cease acquiescence in their disregard. See *Wilkerson* v. *McCarthy*, 336 U. S. 53, 64 (concurring opinion).

HUBSCH *v.* UNITED STATES.

ON APPLICATION OF PETITIONERS AND THE SOLICITOR GENERAL FOR APPROVAL OF SETTLEMENT.

No. 379. Decided December 19, 1949.*

The authority and responsibility for passing upon a proposed compromise of a claim arising under the Federal Tort Claims Act, after commencement of an action thereon, are imposed by 28 U. S. C. § 2677 on the District Court; and such a proposed compromise, submitted here after grant of certiorari to review a judgment of the Court of Appeals affirming judgments of the District Court on such claims, is referred to the District Court for consideration and disposition.

Morris Berick was on the application for petitioners.

Solicitor General Perlman was on the application for the United States.

PER CURIAM.

We granted writs of certiorari in these cases, 338 U. S. 814, to review a decision of the Court of Appeals for the Fifth Circuit, 174 F. 2d 7, affirming judgments of the District Court for the Southern District of Florida in favor of the United States on claims arising under the Federal Tort Claims Act. Before argument, petitioners and the Solicitor General submitted a joint application for approval of proposed settlements of the claims, citing 28 U. S. C. § 2677, which reads as follows:

> "The Attorney General, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under section 1346 (b) of this title [suits under the Tort Claims Act], after the commencement of an action thereon."

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*Together with No. 380, *Schweitzer* v. *United States*.

We construe § 2677 as imposing on the District Court the authority and responsibility for passing on proposed compromises, notwithstanding the judgments of the Court of Appeals affirming the judgments of the District Court heretofore entered herein. The application and stipulations are therefore referred to the United States District Court for the Southern District of Florida with authority to consider and dispose of the same.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

REO MOTORS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 59. Argued November 10, 14, 1949.—Decided January 9, 1950.

In 1941 a corporate taxpayer sustained a loss arising out of the liquidation of a wholly-owned subsidiary whose stock was worthless. Under federal tax laws applicable in 1941, the loss was a long-term capital loss; but it could not enter into the computation of net operating loss, because the taxpayer had no long-term capital gains. Under a 1942 amendment, such a capital loss could enter into the computation of net operating loss, and the taxpayer used the 1941 capital loss in claiming a net operating loss deduction in its return for 1942. *Held:* The taxpayer's net operating loss deduction in 1942 was properly disallowed. Pp. 443–450.

(a) A net operating loss must be computed solely on the basis of the statutes in effect during the year in which the loss was sustained. Pp. 446–449.

(b) The provision of § 101 of the 1942 Revenue Act that the amendments enacted therein "shall be applicable only with respect to taxable years beginning after December 31, 1941" cannot be read to mean "shall be applicable only in computing tax liability for taxable years beginning after December 31, 1941." P. 449.

(c) The fact that the 1924, 1926, 1928 and 1932 Revenue Acts, which permitted the carry-over of net loss from an earlier year, expressly provided that such net loss should be computed under the law in effect during the earlier period, and that the present Code contains no such provision, does not require a result different from that here reached. Pp. 449–450.

(d) *Commissioner* v. *Moore, Inc.*, 151 F. 2d 527, disapproved. Pp. 444–445, n. 4.

170 F. 2d 1001, affirmed.

The Commissioner's determination of a deficiency in petitioner's income and excess profits tax for 1942 was sustained by the Tax Court. 9 T. C. 314. The Court of Appeals affirmed. 170 F. 2d 1001. This Court granted certiorari. 337 U. S. 923. *Affirmed,* p. 450.

James O. Wynn argued the cause for petitioner. With him on the brief was *N. Barr Miller.*

Oscar H. Davis argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

An asserted conflict between the decision below and that of the Court of Appeals for the Fifth Circuit in *Commissioner* v. *Moore, Inc.,* 151 F. 2d 527, made this an appropriate case for our review on writ of certiorari.[1] A recital of the facts must precede definition of the issue.

Petitioner is a Michigan corporation engaged in the manufacture of motor vehicles. On February 1, 1941, Reo Sales Corp., a wholly-owned subsidiary, was dissolved and all of its assets, subject to all its liabilities, were transferred to petitioner. At the date of dissolution, Reo Sales was indebted to petitioner in an amount greater than the value of its net assets. Consequently, its stock, which had an adjusted basis in petitioner's hands of $1,551,902.79, was worthless. This loss was a long-term capital loss under the law applicable in 1941.[2] It was so claimed by petitioner and allowed by the Commissioner.

Petitioner realized no gains from the sale or exchange of capital assets in 1941. Its gross income amounted to $2,573,259.89, while allowable deductions under Chapter 1 of the Internal Revenue Code, exclusive of the capital loss on Reo Sales stock, amounted to $2,215,727.08. With the Reo Sales stock loss included, petitioner's allowable deductions exceeded its gross income by $1,194,369.98.

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[1] 337 U. S. 923.

[2] Section 23 (g) of the Internal Revenue Code, 26 U. S. C. (1940 ed.) § 23 (g).

Under the tax laws applicable in 1941, petitioner's capital loss on Reo Sales stock could not have been utilized as a net operating loss to be carried over to subsequent years. Section 122 (a) of the Code defines "net operating loss" as "the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d)." [3] The exceptions outlined in § 122 (d) included the following, which is pertinent here:

> "(4) Long-term capital gains and long-term capital losses shall be taken into account without regard to the provisions of section 117 (b). As so computed the amount deductible on account of long-term capital losses shall not exceed the amount includible on account of the long-term capital gains, and the amount deductible on account of short-term capital losses shall not exceed the amount includible on account of the short-term capital gains; . . . ." [4]

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[3] Section 122 (a) was amended by § 105 (e) (3) of the Revenue Act of 1942 to read ". . . with the exceptions, *additions*, and limitations provided in subsection (d)." (Italics added.)

[4] Section 122 (d) (4) was amended by § 150 (e) of the Revenue Act of 1942 to read as follows:

"(4) Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117 (b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains."

It was this amendment that was involved in *Commissioner* v. *Moore, Inc.*, 151 F. 2d 527. In 1941 Moore had a long-term capital loss of $17,025 and short-term capital gains of $2,844. Under § 122 (d) (4) as it stood in 1941 (see text, *supra*), long-term capital losses could not be deducted from short-term capital gains in computing net operating losses, while under the 1942 amendment the distinction between long and short-term capital losses was withdrawn. Taxpayer therefore had no net operating loss in 1941, but under the 1942 statute he would have had such a loss to the extent of his short-term capital gain of $2,844. The Court of Appeals for the Fifth

Since petitioner realized no long-term capital gains in 1941, its long-term capital loss on the Reo Sales stock could not enter into the computation of net operating loss.

In the Revenue Act of 1942, § 23 (g) of the Code, which defines capital losses, was amended by adding subsection (4).[5] This amendment had the practical effect of making losses such as that suffered by petitioner in the dissolution of Reo Sales Corp. ordinary rather than capital losses. Under 1942 law, therefore, the exception set out in § 122 (d) (4) is inapplicable, and a loss of this kind may enter into the computation of net operating loss.

It is petitioner's contention, reflected in its 1942 income tax returns, that although its loss in the liquidation of Reo Sales Corp. was incurred in 1941, determination of the amount of net operating loss was postponed until 1942, when it sought to carry over and deduct such net operating loss, and that the 1942 statutes therefore govern that determination. Since, under the 1942 statutes, its loss on Reo Sales stock was an ordinary loss, it claims the right to include that loss in the computation of net operating loss for carry-over and deduction from gross income in 1942. While § 101 of the Revenue Act of 1942 provides that "Except as otherwise expressly provided, the amendments made by this title shall be applicable only with respect to taxable years beginning after December 31, 1941," petitioner contends that this simply means

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Circuit approved such an offset in the computation of net operating loss to be carried over to 1942 and deducted in that year. That decision is obviously inconsistent with the view we take of the statute and must be disapproved.

[5] Subsection (4), which was added by § 123 (a) (1) of the Revenue Act of 1942, provides that, for the purpose of determining capital losses, stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. "Affiliation" is defined in terms that clearly comprehend petitioner's ownership of Reo Sales Corp.

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that such amendments shall be applicable only *in computing tax liability* for tax years after December 31, 1941.

The issue is, therefore, whether, in the computation of net operating loss, the governing statutes are those in effect during the year when the transaction occurred (1941), or whether the statutes in effect during the year when the net operating loss deduction is taken (1942) are controlling. The Commissioner's disallowance of petitioner's net operating loss deduction in 1942 was upheld by the Tax Court, 9 T. C. 314, and the Court of Appeals affirmed, 170 F. 2d 1001.

We think that a net operating loss must be computed on the basis of the tax laws applicable to the year in which the loss was suffered. What petitioner seeks here is not the kind of relief which the statute was designed to grant.[6] It asks that the carry-over section be used as a vehicle by which it may take advantage of changes in the tax laws in years after the taxable event has occurred. We find nothing in the language or legislative history of the statutes to justify such an interpretation.

The scheme of the statute is this: Section 23 (s) of the Code permits as a deduction from gross income "the net operating loss deduction computed under section 122." The amount of that deduction is determined in three separate steps. First, the net operating loss is determined. Section 122 (a)[7] provides the definition and method of computation of net operating loss, specifically providing that the exceptions and limitations of § 122 (d) are applicable in its computation. Second, net operating loss having been determined, the amount and extent to

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[6] See H. R. Rep. No. 855, 76th Cong., 1st Sess. (1939); S. Rep. No. 1631, 77th Cong., 2d Sess. (1942).

[7] "(a) *Definition of net operating loss.*—As usual in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d)." See note 3, *supra.*

which it may be utilized as a carry-over is set out in § 122 (b) (2),[8] and as a carry-back in § 122 (b) (1). Finally, the amount which may actually be deducted from gross income under § 23 (s) is computed under the terms of § 122 (c).[9] That section provides for the aggregation of permissible carry-overs and carry-backs and the application of certain adjustments thereto.

The starting point is thus the determination of net operating loss under § 122 (a). We may point briefly to several circumstances which, we think, require a holding that net operating loss must be computed solely with reference to the statutes in effect during the year when the loss occurred.

First, under petitioner's theory, the net operating loss sustained in any given year would not be a fixed amount but would vary from year to year depending upon changes in the tax laws. But § 122 (a) defines net operating loss as "the excess of the deductions allowed by this chapter over the gross income." Clearly, determination of the amount of gross income and of allowable deductions for any given year must depend upon the tax statutes in

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[8] "(2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year . . ." computed in such a way that the carry-over must be used to offset certain nontaxable, as well as taxable, income. Section 122 (b) (1) is similar in language and theory.

[9] "(c) *Amount of net operating loss deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, . . . in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26 (e)); . . . ."

effect during that year. If, as petitioner contends, 1942 law governs although the loss occurred in 1941, it is difficult to see why the whole of its 1941 operations, and not merely the Reo Sales liquidation, should not be recomputed on the basis of the income and deduction provisions applicable in 1942. Petitioner does not suggest such a recomputation, in spite of the fact that the terms in which net operating loss is defined—"gross income" and "deductions allowed by this chapter"—are equally applicable in the computation of income taxes generally. And even if a distinction could be drawn, so far as applicable law is concerned, between computation of net operating loss and computation of ordinary tax liability, we should think it strained and anomalous to read § 122 (a) as defining net operating loss in this case as "the excess of the deductions allowed for 1942 incomes over the gross income earned in 1941 but computed according to 1942 law."

Furthermore, the language of § 122 (b) negatives the contention that net operating loss for any given year is not a fixed amount but varies depending upon the law in effect during the year when the deduction is taken. Section 122 (b) (2), for example, states that "if for any taxable year the taxpayer has a net operating loss, *such* net operating loss" [10] shall be a carry-over for the two succeeding years. Under petitioner's interpretation, "such net operating loss" "for any taxable year" may be different amounts at different times. And, as in this case, what was no net operating loss at all for the year when the event occurred becomes a loss for that year through subsequent changes in the statutes. Similarly, in some cases in which the taxpayer had net income for the year under controlling law, subsequent changes in the law might produce a net operating loss for that year if

[10] Italics added.

petitioner's construction of the statute prevailed. We find no warrant for the view that Congress intended that a statute designed to equalize tax burdens should be used to produce net losses where none had previously existed.[11]

We also agree with the court below that the words of § 101 of the Revenue Act of 1942, which states that the amendments enacted therein "shall be applicable only with respect to taxable years beginning after December 31, 1941," cannot be read to mean "shall be applicable only in computing tax liability for taxable years beginning after December 31, 1941." To apply § 23 (g) (4) to establish a net operating loss is clearly to apply the 1942 amendment "with respect to" 1941, contrary to the statute.

Petitioner finds comfort in the fact that the 1924, 1926, 1928, and 1932 Revenue Acts, which permitted the carry-over of net loss from an earlier year, expressly provided that such net loss should be computed under the law in effect during the earlier period, while the present Code contains no such provision. Two observations may be made: first, that in reviving carry-overs in 1939 after a seven year lapse, Congress patterned the new statute generally on the prior practice without any suggestion of change in this particular; and second, that while such express provisions were appropriate in Revenue Acts prior to the Code, when the law of a prior year was of no effect when superseded by a new Act unless specifically made applicable, the present Code has continuous application, and incorporation of previous statutes is unnecessary.

[11] In commenting upon a similar possibility in connection with the net loss provisions of the Revenue Act of 1924, the House Committee on Ways and Means stated: "If capital losses were allowed as a deduction in computing the net loss, it would result in the anomalous situation of a taxpayer paying a tax in one year but at the same time having a net loss which he could carry over as a deduction in computing the tax for the subsequent year." H. R. Rep. No. 179, 68th Cong., 1st Sess. 19 (1924).

Instead, the old provisions remain in effect for prior years, and general provisions, such as § 101 of the 1942 Act, give amendments prospective application only, unless otherwise specifically provided.

The result is that net operating loss must be computed solely on the basis of the statutes in effect during the taxable year when the loss was incurred. Only if such a loss exists under those statutes will a taxpayer have anything that may be carried over or back. § 122 (a) and (d). The amount of net operating loss which may be utilized as a carry-over or carry-back and the extent to which it may be used as an offset to net income in another year depend upon the law of the year in which the "carry" is effective, § 122 (b), while the net operating loss deduction which may be taken in any one year depends upon the law in effect during that year. §§ 23 (s) and 122 (c).

With respect to petitioner's other contentions,[12] it is sufficient to say that they ignore the trichotomy plainly established with respect to § 122: determination of net operating loss; determination of the amount and extent of carry-over and carry-back; and determination of net operating loss deduction. The decision of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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[12] Petitioner relies, *inter alia*, upon some language in the Report of the Senate Finance Committee on the Revenue Act of 1942, S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 122, 123. But that portion of the Report is not concerned with computation of net operating loss but with establishment of carry-back provisions and amendment of the carry-over section. Its references are to the law applicable in determining the amount and extent of the carry-over and carry-back (§ 122 (b)), not to that applicable in determining net operating loss (§ 122 (a) and (d)).

Syllabus.

UNITED STATES v. CUMBERLAND PUBLIC SERVICE CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 214. Argued December 12, 1949.—Decided January 9, 1950.

A closely held corporation made to its shareholders a distribution of assets in kind and was dissolved. The stockholders transferred the property to a purchaser. In an action by the corporation for refund of a capital gains tax on the sale, the Court of Claims found, upon proper supporting evidence, that the sale was made by the shareholders rather than by the corporation, and entered judgment for the corporation. *Held:* The record does not require a finding that the sale was made by the corporation rather than by the shareholders, and the judgment of the Court of Claims is affirmed. *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, distinguished. Pp. 452–456.

(a) A corporation may liquidate or dissolve without subjecting itself to the corporate gains tax, even though a primary motive is to avoid the burden of corporate taxation. P. 455.

(b) In this case it was for the Court of Claims (the trial court), upon consideration of the entire transaction, to determine the factual category in which the transaction belonged. P. 456.

113 Ct. Cl. 460, 83 F. Supp. 843, affirmed.

In an action for refund of a federal tax, the Court of Claims gave judgment for the plaintiff. 113 Ct. Cl. 460, 83 F. Supp. 843. This Court granted certiorari. 338 U. S. 846. *Affirmed,* p. 456.

Hilbert P. Zarky argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack.*

Cornelius W. Grafton argued the cause for respondent. With him on the brief was *Wilson W. Wyatt.*

Hugh Satterlee, Thorpe Nesbit and *Rollin Browne* filed a brief, as *amici curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

A corporation selling its physical properties is taxed on capital gains resulting from the sale.[1] There is no corporate tax, however, on distribution of assets in kind to shareholders as part of a genuine liquidation.[2] The respondent corporation transferred property to its shareholders as a liquidating dividend in kind. The shareholders transferred it to a purchaser. The question is whether, despite contrary findings by the Court of Claims, this record requires a holding that the transaction was in fact a sale by the corporation subjecting the corporation to a capital gains tax.

Details of the transaction are as follows. The respondent, a closely held corporation, was long engaged in the business of generating and distributing electric power in three Kentucky counties. In 1936 a local cooperative began to distribute Tennessee Valley Authority power in the area served by respondent. It soon became obvious that respondent's Diesel-generated power could not compete with TVA power, which respondent had been unable to obtain. Respondent's shareholders, realizing that the corporation must get out of the power business unless it obtained TVA power, accordingly offered to sell all the corporate stock to the cooperative, which was receiving such power. The cooperative refused to buy the stock, but countered with an offer to buy from the corporation its transmission and distribution equipment. The corporation rejected the offer because it would have been compelled to pay a heavy capital gains tax. At the same time the shareholders, desiring to save payment of the

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[1] 26 U. S. C. § 22 (a); Treas. Reg. 103, § 19.22 (a)–19.

[2] ". . . No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. . . ." Treas. Reg. 103, § 19.22 (a)–21.

corporate capital gains tax, offered to acquire the transmission and distribution equipment and then sell to the cooperative. The cooperative accepted. The corporation transferred the transmission and distribution systems to its shareholders in partial liquidation. The remaining assets were sold and the corporation dissolved. The shareholders then executed the previously contemplated sale to the cooperative.

Upon this sale by the shareholders, the Commissioner assessed and collected a $17,000 tax from the corporation on the theory that the shareholders had been used as a mere conduit for effectuating what was really a corporate sale. Respondent corporation brought this action to recover the amount of the tax. The Court of Claims found that the method by which the stockholders disposed of the properties was avowedly chosen in order to reduce taxes, but that the liquidation and dissolution genuinely ended the corporation's activities and existence. The court also found that at no time did the corporation plan to make the sale itself. Accordingly it found as a fact that the sale was made by the shareholders rather than the corporation, and entered judgment for respondent. One judge dissented, believing that our opinion in *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, required a finding that the sale had been made by the corporation. Certiorari was granted, 338 U. S. 846, to clear up doubts arising out of the *Court Holding Co.* case.

Our *Court Holding Co.* decision rested on findings of fact by the Tax Court that a sale had been made and gains realized by the taxpayer corporation. There the corporation had negotiated for sale of its assets and had reached an oral agreement of sale. When the tax consequences of the corporate sale were belatedly recognized, the corporation purported to "call off" the sale at the last minute and distributed the physical properties in kind to the stockholders. They promptly conveyed these

properties to the same persons who had negotiated with the corporation. The terms of purchase were substantially those of the previous oral agreement. One thousand dollars already paid to the corporation was applied as part payment of the purchase price. The Tax Court found that the corporation never really abandoned its sales negotiations, that it never did dissolve, and that the sole purpose of the so-called liquidation was to disguise a corporate sale through use of mere formalisms in order to avoid tax liability. The Circuit Court of Appeals took a different view of the evidence. In this Court the Government contended that whether a liquidation distribution was genuine or merely a sham was traditionally a question of fact. We agreed with this contention, and reinstated the Tax Court's findings and judgment. Discussing the evidence which supported the findings of fact, we went on to say that "the incidence of taxation depends upon the substance of a transaction" regardless of "mere formalisms," and that taxes on a corporate sale cannot be avoided by using the shareholders as a "conduit through which to pass title."

This language does not mean that a corporation can be taxed even when the sale has been made by its stockholders following a genuine liquidation and dissolution.[3] While the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial

[3] What we said in the *Court Holding Co.* case was an approval of the action of the Tax Court in looking beyond the papers executed by the corporation and shareholders in order to determine whether the sale there had actually been made by the corporation. We were but emphasizing the established principle that in resolving such questions as who made a sale, fact-finding tribunals in tax cases can consider motives, intent, and conduct in addition to what appears in written instruments used by parties to control rights as among themselves. See, *e. g.*, *Helvering* v. *Clifford*, 309 U. S. 331, 335–337; *Commissioner* v. *Tower*, 327 U. S. 280.

when the corporation is closely held, Congress has chosen to recognize such a distinction for tax purposes. The corporate tax is thus aimed primarily at the profits of a going concern. This is true despite the fact that gains realized from corporate sales are taxed, perhaps to prevent tax evasions, even where the cash proceeds are at once distributed in liquidation.[4] But Congress has imposed no tax on liquidating distributions in kind or on dissolution, whatever may be the motive for such liquidation. Consequently, a corporation may liquidate or dissolve without subjecting itself to the corporate gains tax, even though a primary motive is to avoid the burden of corporate taxation.

Here, on the basis of adequate subsidiary findings, the Court of Claims has found that the sale in question was made by the stockholders rather than the corporation. The Government's argument that the shareholders acted as a mere "conduit" for a sale by respondent corporation must fall before this finding. The subsidiary finding that a major motive of the shareholders was to reduce taxes does not bar this conclusion. Whatever the motive and however relevant it may be in determining whether the transaction was real or a sham, sales of physical properties by shareholders following a genuine liquidation distribution cannot be attributed to the corporation for tax purposes.

The oddities in tax consequences that emerge from the tax provisions here controlling appear to be inherent in the present tax pattern. For a corporation is taxed if it sells all its physical properties and distributes the cash proceeds as liquidating dividends, yet is not taxed if that

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[4] It has also been held that where corporate liquidations are effected through trustees or agents, gains from sales are taxable to the corporation as though it were a going concern. See, *e. g.*, *First National Bank* v. *United States*, 86 F. 2d 938, 941; Treas. Reg. 103, § 19.22 (a)–21.

property is distributed in kind and is then sold by the shareholders. In both instances the interest of the shareholders in the business has been transferred to the purchaser. Again, if these stockholders had succeeded in their original effort to sell all their stock, their interest would have been transferred to the purchasers just as effectively. Yet on such a transaction the corporation would have realized no taxable gain.

Congress having determined that different tax consequences shall flow from different methods by which the shareholders of a closely held corporation may dispose of corporate property, we accept its mandate. It is for the trial court, upon consideration of an entire transaction, to determine the factual category in which a particular transaction belongs. Here as in the *Court Holding Co.* case we accept the ultimate findings of fact of the trial tribunal. Accordingly the judgment of the Court of Claims is

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

UNITED STATES *v.* MOORMAN ET AL., DOING BUSINESS AS J. W. MOORMAN & SON.

CERTIORARI TO THE COURT OF CLAIMS.

No. 97. Argued December 6, 1949.—Decided January 9, 1950.

Specifications attached to and made a part of a government construction contract on the standard form provided that, "if the contractor considers any work demanded of him to be outside the requirements of the contract," he could appeal to the head of the department, "whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract." *Held:* The Court of Claims may not review an administrative decision made under this provision. Pp. 458–463.

1. Contractual provisions for the settlement of disputes have long been used by the Government and sustained by this Court, are not forbidden by Congress, and should not be frustrated by judicial "interpretation" of contracts. Pp. 460–462.

2. Regardless of whether the dispute in this case involved a question of fact or a question of law, it was within the ambit of the clear language of the provision for the final administrative settlement of such disputes. Pp. 462–463.

113 Ct. Cl. 159, 82 F. Supp. 1010, reversed.

The Court of Claims reviewed a decision of the head of a department as to the scope of the work required of a contractor under a standard form of government construction contract and awarded the contractor a money judgment for additional compensation. 113 Ct. Cl. 159, 82 F. Supp. 1010. This Court granted certiorari. 338 U. S. 810. *Reversed,* p. 463.

Morton Liftin argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney.*

V. J. Bodovitz argued the cause for respondents. With him on the brief was *F. A. Bodovitz.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The questions presented relate to the interpretation and validity of terms in a government construction contract providing that in contractual disputes the decisions of the Secretary of War or his authorized representative shall be final and binding.

The respondent partnership entered into a standard form contract with the United States to grade the site of a proposed aircraft assembly plant. Article 1 of the contract provided for payment of 24 cents per cubic yard of grading, satisfactorily completed "in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof . . . ." A proposed taxiway was shown on the drawings but was not located within the plant site as described in the specifications. The present controversy concerns the question of whether the contract required respondent to grade this taxiway.

On demand of the Government, respondent graded for the taxiway at the point shown on the drawings. It then filed a claim with the contracting officer asking extra compensation, 84 cents per cubic yard instead of the 24 cents specified in the contract. Upon investigation the contracting officer made findings of fact which led him to reject respondent's claim. Appeal was taken to the Secretary of War, whose authorized representative also considered the facts and denied the claim. According to Par. 2–16 (a) of the specifications, such a denial is "final and binding upon the parties" when a contractor claims as here that work demanded is "outside the requirements of the contract." [1]

[1] "If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The

Notwithstanding the foregoing provision that the Secretary of War's decision is final and binding, respondent brought this action in the Court of Claims to recover the extra compensation. He there contended that his right to challenge such administrative findings was measured by Art. 15 of the contract, not by Par. 2–16 of the specifications. Article 15 makes a department head's decision "final and conclusive upon the parties" only when such disputes are over "questions of fact." [2] Respondent, alleging that the dispute here was over the proper "interpretation" of the contract, argues that how a contract shall be interpreted is not a "question of fact" but a "question of law." Adding this premise to his assumption that Art. 15 alone governed finality of this administrative decision, respondent contended that the Court of Claims could reconsider the facts, make new findings as a basis for its "interpretation," and then overturn the administrative decision. The Court of Claims did all three. On the basis of its new findings and "interpretation," the court entered a money judgment for respondent computed at 59.3 cents per cubic yard for the taxiway grading. 113 Ct. Cl. 159, 82 F. Supp. 1010.

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contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. . . ." Paragraph 2–16 of the specifications.

[2] "*Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed." Article 15 of the contract.

In petitioning for certiorari the Solicitor General represented that this decision plus previous ones of the Court of Claims had "weakened and narrowed the effectiveness of the well-established policy of the Government to settle, without expensive litigation, disputes arising under its contracts"; and that the total effect of the decisions was to "add further doubt and confusion to the authority of designated officers of the United States to make final decisions under government contracts." [3] We granted certiorari. 338 U. S. 810.

First. Contractual provisions such as these have long been used by the Government. No congressional enactment condemns their creation or enforcement. As early as 1878 this Court emphatically authorized enforcement of contractual provisions vesting final power in a District Quartermaster to fix distances, not clearly defined in the contract, on which payment for transportation was based. *Kihlberg* v. *United States,* 97 U. S. 398. Five years later *Sweeney* v. *United States,* 109 U. S. 618, upheld a government contract providing that payment for construction of a wall should not be made until an Army officer or other agent designated by the United States had certified after inspection that "it was in all respects as contracted for." And in *Martinsburg & Potomac R. Co.* v. *March,* 114 U. S. 549, this Court enforced a contract

[3] These and other representations in the petition for certiorari in this case are substantially identical with representations made by the Solicitor General in asking this Court to review a former Court of Claims judgment reported in 88 Ct. Cl. 284. The case there, it was urged, seemed to be the "culmination of a recent tendency in the Court of Claims to whittle away the authority of designated officers of the United States to make final decisions under contracts." It was insisted that "At least, we submit, the power of the Government to make effective contracts of this character should not be so circumscribed except by decision of this Court." We granted that petition and reversed the judgment without oral argument in a *per curiam* opinion. *United States* v. *McShain,* 308 U. S. 512.

for railroad grading which broadly provided that the railroad's chief engineer should in all cases "determine the quantity of the several kinds of work to be paid for under the contract, . . . decide every question which can or may arise relative to the execution of the contract, and 'his estimate shall be final and conclusive.'" *Id.* at pp. 551–552. In upholding the conclusions of the engineer the Court emphasized the duty of trial courts to recognize the right of parties to make and rely on such mutual agreements. Findings of such a contractually designated agent, even where employed by one of the parties, were held "conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith." *Id.* at p. 555.

The holdings of the foregoing cases have never been departed from by this Court. They stand for the principle that parties competent to make contracts are also competent to make such agreements. The Court of Claims departed from this established principle in *McShain* v. *United States,* 88 Ct. Cl. 284, where it refused to recognize as final the decision of a contracting officer, even though the Government and contractor had agreed that his decision should be final. The Court of Claims' holding was based on its conclusion that the contracting officer's decision had been reached by "interpretation of the contract, drawing, and specifications," and that parties were incompetent to make such decisions binding except as to questions of fact. Its holding was considered such a departure from established contract law that this Court summarily reversed in a *per curiam* opinion [4] citing only two of the many prior cases on the subject. One of the cited cases had enforced a contract provision that "the decision of the Supervising Architect as to the proper interpretation of the drawings and

[4] *United States* v. *McShain,* 308 U. S. 512.

specifications shall be final." *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393.

Similar agreements have been held enforceable in almost every state. See cases collected in Note, 54 A. L. R. 1255 *et seq.* In one state, Indiana, the courts do seem to hold differently, on the ground that permitting engineers or other persons to make final determinations of contractual disputes would wrongfully deprive the parties of a right to have their controversies decided in courts. See cases collected in Note, 54 A. L. R. 1270–1271. In the *McShain* case we rejected a contention that this Court should adopt a rule like Indiana's and we reject it now. It is true that the intention of parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language. *Mercantile Trust Co.* v. *Hensey,* 205 U. S. 298, 309. But this does not mean that hostility to such provisions can justify blindness to a plain intent of parties to adopt this method for settlement of their disputes. Nor should such an agreement of parties be frustrated by judicial "interpretation" of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government.

Second. We turn to the contract to determine whether the parties did show an intent to authorize final determinations by the Secretary of War or his representatives in this type of controversy. If the determination here is considered one of fact, Art. 15 of the contract clearly makes it binding. But while there is much to be said for the argument that the "interpretation" here presents a question of fact, we need not consider that argument. For a conclusion that the question here is one of law cannot remove the controversy from the ambit of Par. 2–16 of the specifications. That section expressly covers

all claims by a contractor who, like respondent here, "considers any work demanded of him to be outside the requirements of the contract . . . ." The parties incorporated it into the specifications and made the specifications part of the contract, all of which they had a legal right to do. The section is neither in conflict with nor limited by Art. 15, for the latter expressly excepts from its coverage such special methods of settlement "otherwise specifically provided in this contract."

The oft-repeated conclusion of the Court of Claims that questions of "interpretation" are not questions of fact is ample reason why the parties to the contract should provide for final determination of such disputes by a method wholly separate from the fact-limited provisions of Art. 15. To hold that the parties did not so "intend" would be a distortion of the interpretative process. The language of Par. 2–16 is clear. No ambiguities can be injected into it by supportable reasoning. It states in language as plain as draftsmen could use that findings of the Secretary of War in disputes of the type here involved shall be "final and binding." In reconsidering the questions decided by the designated agent of the parties, the Court of Claims was in error. Its judgment cannot stand.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

FEDERAL POWER COMMISSION *v.* EAST OHIO GAS CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 71. Argued November 10, 1949.—Decided January 9, 1950.

Respondent owns and operates a natural-gas business wholly within Ohio, selling gas only to Ohio consumers. Most of this gas is transported into Ohio from other states through interstate pipe lines, owned by other companies, which connect inside Ohio with respondent's large high-pressure lines in which the gas, propelled mainly by its own pressure, flows continuously more than 100 miles to respondent's local distribution systems. *Held:*

1. Respondent is a "natural-gas company" subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. Pp. 467–474.

(a) The continuous flow of gas from other states to and through respondent's high-pressure lines constitutes interstate transportation. Pp. 467–468.

(b) The word "transportation" in § 1 (b) of the Act is not limited to companies which both transport natural gas in interstate commerce and sell it for resale; it applies to the movement of interstate gas in respondent's high-pressure pipe lines, even though respondent sells gas direct to consumers rather than for resale. Pp. 468–469, 471–474.

(c) Respondent is not exempt from the Act on the ground that all its facilities come within the proviso in § 1 (b) making the Act inapplicable "to the local distribution of natural gas or to the facilities used for such distribution," since this was not intended to exempt high-pressure pipe lines transporting interstate gas to local mains. Pp. 469–471.

(d) Neither the language of the Act nor its legislative history indicates that Congress meant to create an exception for every company that transports interstate gas in only one state, even when the company is fully subject to state regulation and sells gas direct to consumers rather than for resale. Pp. 471–474.

2. The order of the Federal Power Commission requiring respondent to keep accounts and submit reports as required under the Act is not so burdensome as to exceed constitutional or statutory limitations. Pp. 474–475.

3. The Commission's order did not violate any rights reserved to the states under the Tenth Amendment. P. 476.
84 U. S. App. D. C. 312, 173 F. 2d 429, reversed.

The Federal Power Commission found that respondent was a natural-gas company subject to its jurisdiction and ordered respondent to keep accounts and submit reports as required by the Natural Gas Act, 15 U. S. C. §§ 717 *et seq.* 74 P. U. R. (N. S.) 256. The Court of Appeals reversed, on the ground that respondent was not "engaged in the transportation of gas in interstate commerce within the meaning of the Act." 84 U. S. App. D. C. 312, 173 F. 2d 429. This Court granted certiorari. 337 U. S. 937. *Reversed,* p. 476.

Bradford Ross argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Robert L. Stern, Paul A. Sweeney, Melvin Richter, Bernard A. Foster, Jr.* and *Howell Purdue.*

Harry M. Miller argued the cause for the State of Ohio et al., respondents. With him on the brief were *Herbert S. Duffy,* Attorney General, and *Kenneth B. Johnston,* Assistant Attorney General.

William B. Cockley argued the cause for the East Ohio Gas Co., respondent. With him on the brief were *Walter J. Milde, Wm. A. Dougherty, C. W. Cooper* and *Sturgis Warner.*

By special leave of Court, *Walter R. McDonald* argued the cause and filed a brief for the Indiana Public Service Commission et al., as *amici curiae,* urging affirmance.

Briefs of *amici curiae* urging affirmance were filed by *Everett C. McKeage* and *H. F. Wiggins* for the Public Utilities Commission of California, and by *George H. Kenny* for the Public Service Commission of New York.

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 1 (b) of the Natural Gas Act[1] provides that the Act "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution . . . ." Section 2 (6) defines "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce . . . ." The Federal Power Commission, after hearings, found as facts that respondent East Ohio Gas Company was a natural-gas company and subject to the Commission's jurisdiction.[2] On these and subsidiary findings the Company was ordered to keep accounts and submit reports as required by the Act.[3] The Commission rejected the Company's contentions[4] that its operations were not covered by the Act and that the expense of supplying the required information was so great as to transgress statutory and constitutional limits.[5] The Court of Appeals for the District of Columbia, without reaching other contentions, reversed the Commission's orders on the ground that the Company was not "engaged in the transportation of natural gas in

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[1] 52 Stat. 821, as amended by 56 Stat. 83, 15 U. S. C. § 717 *et seq.*

[2] The Commission instituted the proceedings on its own motion and on complaint of the City of Cleveland, Ohio. Later other Ohio cities filed similar complaints. See 1 F. P. C. 586; 4 F. P. C. 15; 4 F. P. C. 497.

[3] See note 15 *infra.*

[4] The Public Utilities Commission of Ohio, an intervenor, made substantially the same contentions.

[5] 74 P. U. R. (N. S.) 256. Related orders and discussions appear in 4 F. P. C. 15, 497, 638, 28 P. U. R. (N. S.) 129; *East Ohio Gas Co.* v. *Federal Power Comm'n,* 115 F. 2d 385.

interstate commerce within the meaning of the Act." [6] Importance of the questions to administration of the Act prompted us to grant certiorari. 337 U. S. 937.

I.

East Ohio owns and operates a natural-gas business solely in Ohio, selling gas to more than half a million Ohio consumers through local distribution systems. Most of this natural gas is transported into Ohio from Kansas, Texas, Oklahoma, and West Virginia through pipe lines of Panhandle Eastern Pipe Line Company and of Hope Natural Gas Company, an affiliate of East Ohio. Inside the Ohio boundary these interstate lines connect with East Ohio's large high-pressure lines in which the imported gas, propelled mainly by its own pressure, flows continuously more than 100 miles to East Ohio's local distribution systems. The combined length of these high-pressure trunk lines is at least 650 miles.

That this continuous flow of gas from other states to and through East Ohio's high-pressure lines constitutes interstate transportation has been established by numerous previous decisions of this Court. The gas does not cease its interstate journey the instant it crosses the Ohio boundary or enters East Ohio's pipes, even though that Company operates completely within the state where the gas is finally consumed. Respondents do not and cannot claim that their gas is not in interstate commerce.[7] As we held in *Interstate Natural Gas Co.* v. *Federal Power Comm'n,* 331 U. S. 682, 688, the meaning of "interstate commerce" in this Act is no more restricted than that

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[6] 84 U. S. App. D. C. 312, 316, 173 F. 2d 429, 433.

[7] See, *e. g., Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U. S. 626; *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.,* 314 U. S. 498, 503–4. See also *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470; *The Daniel Ball,* 10 Wall. 557.

which theretofore had been given to it in the opinions of this Court.

Respondents contend, however, that the word "transportation" in § 1 (b) must be construed as applying only to companies engaged in the business of transporting gas in interstate commerce for hire or for sales to be followed by resales, whereas East Ohio does neither. The short answer is that the Act's language did not express any such limitation. Despite the unqualified language of § 1 (b) making the Act apply to "transportation of natural gas in interstate commerce," respondents ask us to qualify that language by applying it only to businesses which both transport and sell natural gas for resale. They rely on a sentence in the declaration of policy, § 1 (a), referring to "the business of transporting and selling natural gas." But their contention that the word "and" in the policy provision creates an unseverable bond is completely refuted by the clearly disjunctive phrasing of § 1 (b) itself. As we pointed out in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 516, § 1 (b) made the Natural Gas Act applicable to three separate things: "(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." And throughout the Act "transportation" and "sale" are viewed as separate subjects of regulation. They have independent and equally important places in the Act. Thus, to adopt respondents' construction would unduly restrict the Commission's power to carry out one of the major policies of the Act. Moreover, the initial interest of Congress in regulation of transportation facilities was reemphasized in 1942 by passage of an amendment to § 7 (c) of the Act broadening the Commission's powers over the construction or extension of pipe lines. 56 Stat. 83. This amendment followed a report of the Commission to Con-

gress pointing out that without amendment the Act vested the Commission with inadequate power to make "any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources." [8] We hold that the word "transportation" like the phrase "interstate commerce" aptly describes the movements of gas in East Ohio's high-pressure pipe lines.[9]

Respondents also contend that East Ohio is exempt from the Act because all its facilities come within the proviso in § 1 (b) making the Act inapplicable "to the local distribution of natural gas or to the facilities used for such distribution." But what Congress must have meant by "facilities" for "local distribution" was equipment for distributing gas among consumers within a par-

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[8] Federal Power Commission, Twentieth Annual Report (1940), p. 78. See Wheat, Administration by the Federal Power Commission of the Certificate Provisions of the Natural Gas Act, 14 Geo. Wash. L. Rev. 194, 197.

[9] In the *Pipe Line Cases,* 234 U. S. 548, 562, this Court held that the Uncle Sam Oil Company was not engaged in "transportation" of oil, within the statutory meaning of that word in the Interstate Commerce Act, where it was "simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all . . . ." This holding as to the meaning of transportation in the Interstate Commerce Act has slight force, if any, in determination of the word's meaning under this different and far more comprehensive Act. Furthermore, East Ohio is not merely moving gas for processing in its own plants. It buys and transports it for sale; there is no further processing of any kind, except for eventual reduction of pressure. This puts East Ohio's transportation more nearly in the category of that which we held to bring oil transportation within the coverage of the Interstate Commerce Act. *Valvoline Oil Co.* v. *United States,* 308 U. S. 141, 145; *Champlin Rfg. Co.* v. *United States,* 329 U. S. 29. In the latter case transported oil was to be sold in interstate commerce, while here the sale was to be made in intrastate commerce. This difference, however, is no persuasive reason why the special holding in the *Uncle Sam* case should be expanded to control our holding here.

ticular local community, not the high-pressure pipe lines transporting the gas to the local mains. For in decisions prior to enactment of the statute this Court had sharply distinguished between the two: it had made it clear that the national commerce power alone covered the high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state alone could regulate the gas after it entered those mains.[10] The legislative history shows that the attention of Congress was directly focused on the cases drawing this distinction. It was because these cases had barred federal regulation of community supply systems that the Committee Report could correctly describe the "local distri-

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[10] In both *Public Utilities Comm'n* v. *Landon*, 249 U. S. 236, 245, and *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23, 28, this Court held that states could regulate retail sales of interstate gas to local consumers. In the *Landon* case the Court reasoned that state control of a local distributing company was permissible because "interstate movement ended when the gas passed into local mains." The *Pennsylvania Gas* decision, however, was based on a completely different line of reasoning. The Court held that the gas continued in interstate commerce until it reached the burner tips, but nevertheless permitted state regulation because retail sales presented a problem of local rather than national concern. In *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 310, the Court resolved these conflicting doctrines by readopting the *Landon* rule. It limited the *Pennsylvania Gas* holding to its precise facts by interpreting that decision as resting solely on the *Landon* principle that states could regulate charges for service to local consumers. *Public Utilities Comm'n* v. *Attleboro Co.*, 273 U. S. 83, 89, reaffirmed this choice of doctrine, applying it to a company which like East Ohio transmitted its product (electricity) wholly within one state. In *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U. S. 465, 470–472, the Court recognized that the doctrine of *Pennsylvania Gas* extending interstate commerce to the burner tips was in conflict with and must yield to the doctrine of the *Landon* and *Kansas Gas* cases. See note 13 *infra*. Thus when the Natural Gas Act was passed this Court's decisions had already resulted in a sharp cleavage between local distribution facilities and high-pressure pipe lines serving those facilities.

bution" proviso as surplusage which was "not actually necessary." [11] We are wholly unpersuaded that Congress intended to treat trunk lines like East Ohio's as though they were mere integrated facilities of the numerous community supply systems which they service. Indeed, as respondents admitted upon oral argument here, the logical consequence of such a principle would be that even a pipe line stretching from Texas to Cleveland would be completely exempt from the federal Commission's jurisdiction if it were owned by East Ohio. To draw such a strained inference from the congressional exemption of local distribution systems would ignore the importance of nationally controlling interstate pipe lines in order to preserve "equality of opportunity and treatment among the various communities and States concerned." *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 310.

What we have said indicates that East Ohio comes squarely within the coverage of the Act as set out in §§ 1 (b) and 2 (6). Nevertheless respondents contend that this express coverage is restricted by the broad purpose of the Act to provide federal regulation only for those companies which states could not regulate. Urging that all of East Ohio's business is fully subject to regulation by the state, they rely on statements by this Court that Congress intended not to cut down state regulatory power, but rather to supplement it by closing "the gap created by the prior decisions." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507, 517–519; see also *Public Utilities Comm'n of Ohio* v.

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[11] The Report stated that the proviso was "not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission." H. R. Rep. No. 709, 75th Cong., 1st Sess., pp. 3–4. This could only mean that the phrase "interstate commerce" was construed by the Committee, as it had been by this Court, to exclude "local distribution."

United Fuel Gas Co., 317 U. S. 456, 467. We adhere to those statements. But *prior* constitutional decisions, not what we have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act. *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 508; and see *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 250.

In a series of cases repeatedly called to the attention of the House Committee,[12] this Court had declared that states could regulate interstate gas only after it was reduced in pressure and entered a local distribution system. *Public Utilities Comm'n* v. *Landon*, 249 U. S. 236, 243; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 310; *Public Utilities Comm'n* v. *Attleboro Co.*, 273 U. S. 83, 89; and see *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U. S. 465, 470–472.[13] Under these decisions state regulatory power could

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[12] The record of the Committee hearings considering the proposed bill is crowded with repeated references to the cases discussed in note 10 *supra;* no other cases received such emphasis. The General Solicitor for the National Association of Railroad and Utilities Commissioners, for example, explained that the *East Ohio* case "established very clearly that a State has jurisdiction to regulate the business of distributing gas after it has been imported, and the pressure has been stepped down to permit of local distribution. It, however, leaves the State authorities still subject to the rule announced in the *Kansas case* . . . ." Hearings before the House Subcommittee of the Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., 88. The Solicitor of the Federal Power Commission pointed out in his brief to the same committee that "The States cannot control the wholesale rates extracted for natural gas thus transported, nor may they regulate any other of the phases of the interstate transportation." *Id.*, 16. Amendments which would have specifically exempted from federal regulation all companies operating wholly within one state were proposed but rejected.

[13] See note 10 *supra.* The *East Ohio* case cited above concerned the question of whether the company was subject to state taxes. The tax doctrines involved are irrelevant here. Undeniably relevant, however, is the fact that Congress directly considered the doctrine

not reach high-pressure trunk lines and sales for resale. This was the "gap" which Congress intended to close. It therefore acted under the federal commerce power to regulate what these decisions had indicated that the states could not. We have already held that in so doing Congress subjected to federal regulation a company transporting interstate gas, and selling it for resale, wholly within one state. *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498.[14] The only respect in which East Ohio differs from that company is that it sells gas direct to consumers rather than for resale. This difference is immaterial. For as we have already pointed out, East Ohio comes directly within the express provision granting power to the Commission to regulate "transportation of natural gas in interstate commerce," just as the Illinois company came directly within the express provision covering sale for resale. And in the light of the *Illinois Gas* decision we cannot see how the "local distribution" proviso can be construed as encompassing all of East Ohio's operations throughout the state. That proviso cannot mean one thing for "transportation" and another where "sale for resale" is involved.

Here as elsewhere, once a company is properly found to be a "natural-gas company," no state can interfere with federal regulation. That a state commission might also have some regulatory power would not pre-

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of interstate commerce enunciated in that case: that transportation of out-of-state gas to the local systems "is essentially national—not local—in character and is interstate commerce within as well as without that State." 283 U. S. 465, 470.

[14] There are implications in the Court's opinion that under prevailing constitutional doctrine a state might now, in the absence of federal legislation, regulate such a company as Illinois Gas or East Ohio. See *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504, discussed in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 512. But compare *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 545.

clude exercise of the Commission's function. *Connecticut Light & Power Co.* v. *Federal Power Comm'n,* 324 U. S. 515, 533; *Public Utilities Comm'n* v. *Attleboro Co.,* 273 U. S. 83, 89–90. Nor does the Act purport to abolish all overlapping. Section 5 (b), for example, provides that the Commission may "investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." 52 Stat. 824. Yet clearly the state agency establishing such a rate would have equivalent authority.

We find no language in the Act indicating that Congress meant to create an exception for every company transporting interstate gas in only one state. Regardless of whether it might have been wiser and more farseeing statesmanship for Congress to have made such an exception, we should not do so through the interpretative process. There is nothing in the legislative history which authorizes us to interpret away the plain congressional mandate.

II.

A contention not passed on by the Court of Appeals but urged here by respondents, is that compliance with the Commission's accounting and report orders would impose so great a burden on East Ohio "as to make such orders transgress statutory and federal constitutional limits." Our attention is not specifically referred to anything in the record showing that the Commission has required East Ohio to adopt any particular accounting method or make any particular report not reasonably related to the Commission's granted powers in this respect.[15] Nor did the

[15] The orders here primarily rest on Commission regulations pursuant to the following sections. Section 6 (b) authorizes the Commission to require a natural-gas company to file "an inventory of all

Commission fail to make proper findings to support its order. All of the Commission requirements affirmatively appear to call for the precise kind of accounting system, information, and reports that Congress deemed relevant and necessary for the Commission to have in performing its regulatory duties. The principles of law governing such requirements were adequately set out by Mr. Justice Cardozo speaking for the Court in *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232. See also *Northwestern Electric Co.* v. *Federal Power Comm'n,* 321 U. S. 119. Measured by these criteria for judicial review of such orders, we find no reason to reject the Commission's findings that the orders here issued were necessary and proper as applied to East Ohio. And as to the cost of compliance, it is sufficient to say as the Court said in the *American Telephone & Telegraph* case, *supra,* p. 247: "The evidence does not show that the expense . . . will lay so heavy a burden upon the companies as to overpass the bounds of reason." [16]

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or any part of its property and a statement of the original cost thereof, and . . . keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction." 52 Stat. 824, 15 U. S. C. § 717e (b). Section 8 (a) makes it the duty of such companies to keep "such accounts, records of cost-accounting procedures," etc., as the Commission may by rules and regulations prescribe. Section 10 (a) similarly requires "annual and other periodic or special reports." Section 5 (b) authorizes the Commission to "investigate and determine the cost of the . . . transportation of natural gas by a natural-gas company" even where the Commission has no authority to establish rates for the transportation or sale of that gas. Section 16 vests the Commission with broad powers to prescribe general orders, rules and regulations found "necessary or appropriate to carry out the provisions of this Act."

[16] The Commission found that East Ohio's estimate placing the cost of compliance at between $1,500,000 and $2,000,000 was "not convincing, for our experience with other companies with greater property investment indicates that this estimate is considerably exaggerated." 74 P. U. R. (N. S.) 256, 263.

The contention that the Commission's order violates the reserved rights of the states under the Tenth Amendment is foreclosed by the Court's holding in *Northwestern Electric Co.* v. *Federal Power Comm'n, supra,* at 125. Section 8 (a) of the Natural Gas Act itself provides that "nothing in this Act shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State."

The Commission's order is valid and should be enforced.

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON took no part in the consideration or decision of this case.

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, dissenting.

If this were a case of applying an explicit policy of Congress to one recalcitrant gas company, there would of course be no dissent. But if it were such, we would not be likely to find the State of Ohio and her Utility Commission, the National Association of Railroad and Utility Commissioners, and public authorities of several states, including some with notable records for protecting the public interest, here helping the utility. This alliance of state authorities against the Federal Power Commission suggests that there must be more to this case than meets the eye.

The key to an understanding of the Federal Natural Gas Act is its purpose to supplement but not to supplant state regulation. Before passage of the Act, each state was able to regulate the ultimate price of natural gas distributed to its consumers. *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23. This Court has never denied any state that power. But in doing so they were obliged to allow as operating costs what the distributing

company paid for the gas when brought into its system from out of the state. This purchase price the state could not regulate, often not even investigate, and the purchases frequently were from affiliates, a fact which might cool the local company's normal zeal to drive a good bargain for itself and its consumers. Hence, the states appealed to Congress to set up machinery to fix the import price of out-of-state gas. This was all that the states asked the Federal Government to do, and it is everything that the Federal Power Commission revealed any purpose to do while the legislation was pending. Its Solicitor summarized the purposes before a subcommittee of the House Committee on Interstate and Foreign Commerce, as follows: "The whole purpose of this bill is to bring under Federal regulation the pipe lines and to leave to the State commissions control over distributing companies and over their rates, whether that gas moves in interstate commerce or not." Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., 24. That is what the state authorities active in promoting the legislation seem to have believed had been accomplished.

East Ohio is an all-Ohio company, deriving income solely from distributing gas directly to Ohio consumers. It sells no gas for resale. All of its assets are located and all of its business is transacted in Ohio. Since 1911, the Ohio State Commission has exercised regulatory powers over it which have included rate-making, authorizing acquisition of sale of property, approval of capitalization and security issues, complete control of accounting practices and requiring detailed periodic reports. Except for inability to fix the price at which gas should be delivered to the company at the state line, Ohio is able to supervise and regulate this utility completely and continuously.

The Federal Power Commission, as authorized by the Act, fixed the state-line price that East Ohio must pay

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for its out-of-state supplies. But now it seeks to go beyond this and superimpose some features of its regulation which conflict with the regulation of the identical subject matter by the State of Ohio. How much farther than the order here under review the Commission will go in supplanting or duplicating state regulation is not clear from its argument, and how far it can go is rendered unclear by the Court's opinion which expressly approves some overlapping but leaves its bounds in carefully stated doubt. The anxiety which this program stirs among other states is explained by its magnitude. The Power Commission in its petition here notes forty-three pending cases in which it takes this same position *vis-à-vis* state regulation.

It appears that the present particular issue arises because the Commission has theories of accounting different from those the state has seen fit to accept. The Federal Commission has ordered East Ohio to change its entire accounting system for all of its properties at a very heavy cost. This requires it either to conduct its accounting contrary to laws of Ohio and the orders of the State Commission or perhaps to keep two sets of books. This is a real conflict in which experience shows state control will wither away and leave the federal rule in possession of the field.

This Court can sustain such overlapping and overriding of the state's authority only by repudiating its own recent statements. After reviewing the history of the Natural Gas Act, we have said that "Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions." *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 467. In a later case, quoting H. R. Rep. No. 709, 75th Cong., 1st Sess., we said that "the bill was designed to take 'no authority from State commissions' and was 'so drawn as

to complement and in no manner usurp State regulatory authority.' " *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610. Quoting the same House Report, we thereafter pointed out that "the 'basic purpose' of Congress in passing the Natural Gas Act was 'to occupy this field in which the Supreme Court has held that the States may not act.' " *Interstate Natural Gas Co.* v. *Federal Power Comm'n*, 331 U. S. 682, 690. And only last year we observed that, "The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513.

What defines the point beyond which the provisions of the Act shall not apply? The Court suggests that there is an inherent limitation on the affirmative grant of power which would render surplusage the clause in § 1 (b) denying application of the Act to "the local distribution of natural gas or to the facilities used for such distribution." Or it may be this exclusionary clause itself. At any rate, the Court finds the dividing line of jurisdiction to be drawn by physical characteristics of the transmission lines. It seizes upon the point where the high pressure at which gas is transmitted any substantial distance is reduced to the low pressure at which it must be served to customers' burners through the community supply lines as the outer limit of the "local" area reserved to the states.

Recognizing the purpose of the Federal Natural Gas Act of June 21, 1938, to regulate only that which was unregulated and unregulatable by the states, the Court assumes that decisions *prior* to its passage, "not what we have since decided or would decide today," fix the states' power for the purposes of measuring that of the Commis-

sion. The Court has heretofore followed the principle that Congress does not intend to freeze the impact of its legislation within current judicial decisions in the absence of evidence which makes such intention unmistakable. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. But today it makes no effort to look for evidence of such an intention and had it searched it would not have found it. *Cf. Helvering* v. *Griffiths,* 318 U. S. 371; *Parker* v. *Motor Boat Sales,* 314 U. S. 244.

Today's anomalous result whereby the Commission is given regulatory power over the intrastate distribution facilities of a gas company over whose sales it admittedly has no jurisdiction is based upon the premise that paramount in Congress' mind in dealing with cases prior to passage of the Act, was, not the holdings of applicable cases relating to regulation, but the peculiarly mechanistic formula employed principally in 1931 in *East Ohio Gas Co.* v. *Tax Comm'n,* 283 U. S. 465,[1] as a means of holding that the State of Ohio could levy an excise tax based on the entire gross receipts from sales to local consumers by an interstate gas company.

I find no convincing indication, either in the language of the Act or in its legislative history, that Congress intended that we should be forever bound, in construing this legislation, either by the then current decisions as to limitations of the Commerce Clause on state power, *cf. United States* v. *South-Eastern Underwriters Assn., supra,* or by the then current criteria of what separated local from nonlocal facilities. The crucial question is not whether this Court in 1931 would have held a given

[1] In the *East Ohio* tax case the reduction of pressure and expansion of volume of the gas at the point of entrance into local supply mains was compared to the breaking of an original package after shipment in interstate commerce, so that its contents could be treated, prepared for sale and sold at retail.

factual situation without the area of local distribution and beyond the reach of state regulation, but whether this Court today can say that the federal power can be exerted because the state power cannot be exerted. So long as we pay even lip service to Congress' intention to leave to the states that which they can regulate, we cannot satisfactorily beg this question.

But even if the Court is to shift to the doctrine that Congress casts its Acts forever in the mold made by prior decisions of this Court, the pressure-reduction station now relied upon to limit "local" had lost its standing even in tax cases and never was accepted in regulation cases. If Congress was interested in tax case criteria when it passed the Natural Gas Act, it must have known of this Court's disdainful disregard of pressure changes in favor of emphasis on the difference between wholesale and retail distribution less than half a year after the *East Ohio* tax decision. *State Tax Comm'n* v. *Interstate Natural Gas Co.*, 284 U. S. 41.[2]

And yet, although the Committee Reports and the records of congressional debates on the Natural Gas Act may be scanned in vain for any mention of this pressure-reduc-

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[2] The question before the Court concerned the power of the State of Mississippi to tax wholesale operations of an interstate pipe-line company. Curtly dismissing the State's arguments resting on the fact that the gas pressure had been reduced before the sale for resale, the Court held, as succinctly stated in the headnote: "The selling of gas wholesale to local, independent distributors from a supply passing into and through the State in interstate commerce, does not become a local affair and subject to a local privilege tax merely because the vendor, to deliver the quantities sold, uses a thermometer and a meter and reduces the pressure." In its argument to the Court, 284 U. S. at p. 42, the State had presented the analogy of pressure reduction to the breaking of an original package shipped in interstate commerce, *cf.* note 1, *supra*. *State Tax Comm'n* v. *Interstate Natural Gas Co.*, 284 U. S. 41.

tion point, we are now asked to believe that Congress fixed it as the point where state control should end and federal control should begin. With this approach, today's decision confines the states' regulatory power to the service area, bounded by the low-pressure transmission system, which means practically within the city gates. By its emphasis on this pressure change the Court finds a plain congressional grant of Commission jurisdiction over high-pressure pipe lines such as those of East Ohio. However, this pressure factor is one which we found immaterial in *Interstate Natural Gas Co.* v. *Federal Power Comm'n, supra,* 689, where, with rare unanimity, we put our emphasis upon the fact of sale for resale in interstate commerce. But today it is the difference between retail and wholesale operations which is termed immaterial, so long as the factor of high-pressure pipe lines is present.

This shift in emphasis rests upon inferences drawn from the legislative history of the Natural Gas Act which are wholly inconsistent with those drawn in our prior decisions examining the subject. Heretofore we have been careful consistently to observe that Congress did not attempt to occupy the entire field within the limits of its constitutional power, and until today we have insisted that in extending federal regulation Congress "was meticulous to take in only territory which this Court had held the states could not reach." *Panhandle Eastern Pipe Line Co.* v. *Comm'n,* 332 U. S. 507, 519. We said only two years ago in that case that "by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to local consumers, as exemplified in *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23; the latter, service interstate to local distributing companies for re-

sale, as held in *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, reinforced by *Public Utilities Comm'n* v. *Attleboro Co.*, 273 U. S. 83." And we went on to say that the purpose of the legislation was to make state regulation effective "by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions." *Id.*, pp. 514, 517. And see *Interstate Natural Gas Co.* v. *Federal Power Comm'n*, 331 U. S. 682, 689; also, *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609, quoting from *Illinois Natural Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 506. We could hardly have said more clearly that the "gap" was in the wholesale realm of the natural-gas industry in interstate commerce.

The Court's opinion professes to adhere to these statements relating to the gap Congress intended to close. But it first widens the gap, squarely upon the premise that, under decisions of this Court called to Congress' attention prior to passage of the Act, the state regulatory power could not reach transmission lines for interstate gas outside the point of reduction in pressure. Actually, no decision could have been called to the attention of Congress, and none is or can be cited today, in which this Court held that any of the intrastate transmission lines of any retail gas, electric or similar company, within or without the pressure-reduction point, were beyond the state regulatory authority. Nor was this question even at issue in any case cited by the Court in support of its premise. That is not to say that the question was not considered, however. Quite to the contrary, less than two months before passage of the Natural Gas Act, this Court, through the pen of Mr. Chief Justice Hughes, in a case not cited by the Court, declared that such transmission lines were properly within the sphere of state rate-making powers. *Lone Star Gas Co.* v. *Texas*, 304

U. S. 224.[3] And so if Congress were consulting the decisions of this Court to define the gap in state power, which it must fill with the Commission's function, it found the latest, and all but unanimous one, to declare that no gap such as the Court perceives today was then existent.

Although the scope of the Natural Gas Act was not limited to sales of natural gas in interstate commerce for resale, it must be recognized that, if any one thing is clear from the legislative history of this Act, it is that Congress' paramount concern was to establish regulation of such prices.[4] And it must likewise be recognized that what-

[3] In the *Lone Star* case this Court examined the validity of an order of a Texas commission fixing the rate to be charged by the Lone Star company for gas sold to local distributing companies at the gates of numerous Texas communities. Most of the Lone Star gas was piped from fields in the Texas Panhandle, but across a segment of Oklahoma. A small amount was produced or purchased in Oklahoma, piped into Texas, treated, and added to the local supply. Thus commingled beyond separate recognition, both types of gas were conducted through high-pressure lines and sold to the various retail distributing companies. Because of the interrelated corporate structure of Lone Star and these distributing companies, the Court treated them as one operating unit, and approved the state's exercise of its rate-making power based upon valuation of the entire integrated system.

[4] H. R. Rep. No. 709, 75th Cong., 1st Sess. 1–2, adopted without change in S. Rep. No. 1162, 75th Cong., 1st Sess. 1–2, said of the proposed bill which became the Natural Gas Act: ". . . The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even

ever of our old doctrines may have been frozen into the Act could not include the point of pressure reduction and entrance into municipal lines as the measure of state regulatory authority, for no such doctrine can be found in our cases.

Thus it is apparent that in selecting the point to mark either the inherent limitation in the Act's affirmative grant of power to the Commission, or the corollary limit imposed by the clause excluding facilities used in local distribution, the Court has resorted to criteria neither

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in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

Congressional debates on the bill were similarly concerned with those aspects of the natural gas industry over which no state regulatory control existed. These debates were led, in the House, by Chairman Lea of the Committee on Interstate and Foreign Commerce, and, in the Senate, by Chairman Wheeler of the Committee on Interstate Commerce. In his explanatory statement the former declared, "The primary purpose of the pending bill is to provide Federal regulation, in those cases where the State commissions lack authority, under the interstate-commerce law. This bill takes nothing from the State commissions; they retain all the State power they have at the present time." 81 Cong. Rec. 6721. And he added later, "The object of this bill is to supply regulation in those cases where the State commission has no power to regulate." *Ibid.* Committee member Halleck assured the House that "this bill seeks only to reach those sales where the sale is for resale to the ultimate consumer." *Id.*, 6723. And in the Senate, Chairman Wheeler declared: "There is no attempt and can be no attempt under the provisions of the bill to regulate anything in the field except where it is not regulated at the present time. It applies only as to interstate commerce and only to the wholesale price of gas." 81 Cong. Rec. 9313.

Neither the *East Ohio* case nor its mechanistic formula was emphasized or even adverted to in the Committee Reports or in the congressional debates.

supportable by this Court's decisions prior to the Act nor even claimed to be consistent with its most recent doctrines.

But if the pressure-reduction point cannot be resurrected from the *East Ohio* tax case to bound the facilities used in the local distribution of natural gas in interstate commerce, what criteria can we employ? It is not as though a simple, unsophisticated answer were not available. It seems to me that the obvious answer is that intrastate transmission lines of a retail gas company devoted exclusively to serving communities within the state are facilities used in the local distribution of natural gas and are accordingly excepted from application of the Act. For it must not be forgotten that if justification for today's decision cannot be found in § 1 (b) of the Act, it cannot be established by resort to the language of those sections defining the Commission's powers. For § 1 (b) is jurisdictional. It sets forth the areas to which the provisions of the Act shall and shall not apply. Its "but" clause was Congress' assurance to the state bodies sponsoring the legislation that federal control would not extend to the area within their authority. *Cf. Connecticut Light & Power Co.* v. *Federal Power Comm'n,* 324 U. S. 515, 527.

This simple solution squares not only with modern standards, but also with the approach, if it is to be adopted, that Congress in passing this Act froze into law current judicial decisions. It keeps faith with the states. It is decidedly consistent with our recent declaration under the almost identical words of a similar Act that limitation of local facilities was not to be found in the *East Ohio* tax formula, and that even the transmission lines of a state-wide system supplying electric power to consumers in over a hundred communities are "facilities used in local distribution." *Connecticut Light & Power Co.* v. *Federal Power Comm'n, supra.*

Of course, this solution does not render meaningless the "transportation of natural gas in interstate commerce" to which the provisions of the Act apply. For instance it would logically enough give to the Federal Power Commission, under the above "transportation clause," exclusive jurisdiction over the main transmission lines of a retail gas company which ran through Ohio and on into New York; but it would leave to Ohio exclusive jurisdiction over lateral lines branching out from the main trunk in Ohio and, whether one or one hundred miles long, devoted exclusively to delivering gas to the burner tips in Ohio communities. Similarly, under the hypothesis constructed in the Court's opinion, wherein East Ohio is pictured as having its own transmission lines extending all the way from Texas, it would give exclusively to the Power Commission jurisdiction over those lines beyond the Ohio border as well as over those within or without the state not devoted exclusively to serving Ohio consumers at retail. Again, it would, quite obviously within the words of the Act, give exclusively to the Power Commission jurisdiction over companies which might act in the nature of common carriers transporting gas in interstate commerce for hire. In short it would give to the transportation clause a meaning which, contrary to today's opinion, does not render surplusage the "sale in interstate commerce of natural gas for resale" to which the provisions also apply.[5]

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[5] The suggested construction also comports with the conclusions of the House and Senate Committee reports, H. R. Rep. No. 709, 75th Cong., 1st Sess. 3, and S. Rep. No. 1162, 75th Cong., 1st Sess. 3: "That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character."

What the Power Commission asks the Court to do today is not to fill a gap in the state's power to regulate, for there is none, but to create a gap in order to make room for federal power.

I can well understand the zeal of the Federal Power Commission to expand its control over the natural gas industry. It sprawls over many states and each system must be physically integrated from the depths of the wells to the consumer's burner tips. Its regulation cannot be uniform if the Federal Commission controls only a middle segment, with production on one end and distribution on the other committed to the control of different states. But that was as far as Congress was willing to supersede state authority. It left the peculiar problems affecting production to the producing states, it left the ultimate protection of consumers to the consuming states, and it left the Federal Power Commission in the middle to fix the rates for gas moving between the two. This obviously subdivides regulation of what has to operate as a unitary enterprise, but that is often the consequence of our federal system. Whatever we may think would be wise policy in this field, the Act which Congress passed places limitations upon the Power Commission, which may chafe but which neither we nor the Commission are free to override. If the Commission had foreshadowed its present course, I do not suppose the Act would have passed, for it certainly would have evoked resistance of the state regulatory agencies instead of their support.

Congress may well have believed that diversity of experimentation in the field of regulation has values which centralization and uniformity destroy. As Mr. Justice Brandeis said, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v.

Liebmann, 285 U. S. 262, 311. Long before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences.

We must not forget that regulatory measures are temporary expedients, not eternal verities—if indeed they are verities at all. Certainly one of the matters on which the states might well be indulged—the right to an opinion of their own—is as to the accounting methods of a utility whose whole property and business being accounted for is within the state. Out of their diversity of practice and experience emerge pragmatic tests. What the Federal Power Commission seeks to require of this Ohio gas company, for example, is to revert by accounting methods to emphasis on original cost, a basis which William Jennings Bryan for an earlier generation of progressives eloquently urged this Court to reject in the field of railroad rate-making. *Smyth* v. *Ames,* 169 U. S. 466. See Mr. Bryan's argument, p. 489. That is a basis of which, last month, we said in another connection, "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost." *United States* v. *Toronto Navigation Co.,* 338 U. S. 396, 403. It must be remembered that closer than any federal agency to those they regulate and to their customers are the state authorities, whose mechanisms are less cumbersome and whose principles can much more quickly be adjusted to the changing times.

We should not utilize the centralizing powers of the federal judiciary to destroy diversities between states which Congress has been scrupulous to protect. If now and then some state does not regulate its utilities according to the federal standard, it may be a small price to pay for preserving the state initiative which gave us utilities regulation far in advance of federal initiative.

I think that observance of good faith with the states requires that we interpret this Act as it was represented at the time they urged its enactment, as its terms read, and as we have, until today, declared it, *viz.* to supplement but not to supplant state regulation. What amounts to an entrapment of the state agencies that supported this Act under the representation that it would not deprive them of powers but would only make their powers effective will probably not make it easier to get needed regulatory legislation in the future.

SAVORGNAN *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 48. Argued November 7–8, 1949.—Decided January 9, 1950.

In 1940, petitioner, a native-born American citizen who was a competent adult woman, voluntarily and knowingly applied for and obtained Italian citizenship while in the United States through naturalization in accordance with Italian law. She went to Italy in 1941 and lived there with her Italian husband until 1945, when she returned to the United States. *Held:* She expatriated herself under the laws of the United States by her naturalization as an Italian citizen followed by her residence abroad. Pp. 492–506.

(a) Within the meaning of § 2 of the Citizenship Act of 1907, the term "naturalization in any foreign state" includes naturalization proceedings which lead to citizenship in a foreign state, even though such proceedings take place in the United States. P. 499.

(b) After a competent adult American citizen has voluntarily and knowingly performed an overt act which spells expatriation under the wording of the Citizenship Act of 1907, he cannot preserve or regain his American citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act, since those legal consequences are not dependent upon the intention of the citizen. Pp. 499–502.

(c) Whether this case be governed as to foreign residence by the Nationality Act of 1940 or the Citizenship Act of 1907, the fact that, following her naturalization as an Italian citizen, petitioner actually resided abroad (*i. e.*, had a "place of general abode" there) from 1941 to 1945 deprived her of her American citizenship, regardless of whether she intended to abandon her residence in the United States or to obtain a permanent residence abroad. Pp. 503–506.

(d) No decision is made on the question whether petitioner's Italian naturalization in 1940 would have deprived her of American citizenship had she not taken up her residence abroad. Pp. 502–503.

(e) Petitioner's signing of the instrument containing her oath of allegiance to the King of Italy was an oath of allegiance to a foreign state within the meanings of § 2 of the Citizenship Act of

1907 and § 401 (b) of the Nationality Act of 1940, even though no ceremony or formal administration of the oath accompanied her signature. P. 496, n. 5.
171 F. 2d 155, affirmed.

In a suit under § 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. § 903, the District Court granted respondent a judgment declaring her to be an American citizen. 73 F. Supp. 109. The Court of Appeals reversed. 171 F. 2d 155. This Court granted certiorari. 337 U. S. 914. *Affirmed*, p. 506.

Suel O. Arnold and *Carl A. Flom* argued the cause and filed a brief for petitioner.

Oscar H. Davis argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan.*

Briefs of *amici curiae* urging reversal were filed by *Walbridge S. Taft* for Margaret Trimble Revedin, and by *Jack Wasserman* and *Gaspare Cusumano* for the Association of Immigration and Nationality Lawyers.

MR. JUSTICE BURTON delivered the opinion of the Court.

The question is whether, under the special circumstances of this case, a native-born American citizen who became an Italian citizen in 1940, and lived in Italy with her Italian husband from 1941 to 1945, nevertheless retained her American citizenship. For the reasons hereinafter stated, we hold that she did not. The controlling statutes are § 2 of the Citizenship Act of 1907,[1] and §§ 401,

[1] "SEC. 2. *That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.*

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any

403 and 104 of its successor, the Nationality Act of 1940.[2]

The petitioner, Rosette Sorge Savorgnan, brought this action in the United States District Court for the Western

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other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war." (Emphasis supplied.) 34 Stat. 1228, 8 U. S. C. (1934 ed.) § 17.

[2] "SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

"(a) *Obtaining naturalization in a foreign state,* either *upon his own application* or through the naturalization of a parent having legal custody of such person: . . . or

"(b) *Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; . . .*" (Emphasis supplied.) 54 Stat. 1168–1169, 8 U. S. C. § 801 (a) and (b).

"SEC. 403. (a) Except as provided in subsections (g), (h), and (i) of section 401, no national can expatriate himself, or be expatriated, under this section[*] while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section[*] *if and when the national thereafter takes up a residence abroad.*" (Emphasis supplied.) 54 Stat. 1169–1170, 58 Stat. 677, 8 U. S. C. § 803 (a).

"SEC. 104. For the purposes of sections 201, 307 (b), *403,* 404, 405, 406, and 407 of this Act, *the place of general abode shall be deemed the place of residence.*" (Emphasis supplied.) 54 Stat. 1138, 8 U. S. C. § 504.

*The words "this section" as used in § 403 refer to § 401. This not only is evident from the context but a ready explanation appears from the fact that the language of § 403 originally appeared as a proviso in § 401 (h) of H. R. 6127, 76th Cong., 1st Sess. (1940). Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess. 25 (1940). H. R. 9980 became the Nationality Act of 1940.

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District of Wisconsin, under § 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. § 903, for a judgment declaring her to be an American citizen. That court decided in her favor. 73 F. Supp. 109. The United States Court of Appeals for the Seventh Circuit reversed the judgment and remanded the case with directions to dismiss the petition against the United States because it had not consented to be sued, and to enter judgment in favor of the other defendants in conformity with its opinion. 171 F. 2d 155. Because of the importance of this decision in determining American citizenship, we granted certiorari. 337 U. S. 914.

Insofar as material, the undisputed facts and those found by the District Court are as follows:

The petitioner was born in Wisconsin in 1915 of native-born parents and resided in the United States until July, 1941. In March, 1940, her intended husband, Alessandro Savorgnan, was an Italian citizen, serving as Italian Vice Consul at St. Louis, Missouri. He informed her that, under Italian law, she would have to become an Italian citizen before he could obtain the necessary royal consent to their marriage. She applied for Italian citizenship. He prepared her application. It was in Italian which he understood, but which she did not understand. In August, the petitioner was granted Italian citizenship. In November, she appeared with Savorgnan at the Italian Consulate in Chicago, Illinois, and, in his presence, signed an instrument which contained an oath, in Italian, expressly renouncing her American citizenship and swearing her allegiance to the King of Italy.[3] No ceremony or formal administration of the oath accompanied her signature and apparently none was required. She and Sa-

[3] A translation shows that this instrument included the following statement:

"The person in question [Rosetta Andrus Sorge, who, as Rosette Sorge Savorgnan, later became the petitioner in the instant case],

vorgnan understood that her signing of this instrument had to do with her citizenship and with securing the required royal consent for Savorgnan to marry her, but he did not translate the instrument or explain its contents to her. The District Court found as a fact that, at the time of signing each of the documents mentioned, the petitioner, although intending to obtain Italian citizenship, had no intention of endangering her American citizenship or of renouncing her allegiance to the United States.

December 26, 1940, the petitioner and Savorgnan were married. In July, 1941, when Italian diplomatic officials were required to leave the United States, an Italian diplomatic passport was issued to the petitioner, and she embarked for Italy with her husband. She remained in Italy until November, 1945, except for six months spent in Germany. While in Italy she lived with her husband and his family in Rome, where he worked in the Italian Foreign Ministry. In November, 1945, she returned to America on an Italian diplomatic passport and later requested the Commissioner of the Immigration and Naturalization Service to correct the records of his office to show that she was an American citizen at the time of her return to America. The request was denied and she instituted the present proceeding.

There is no evidence of her maintaining, at any time after her marriage, a residence, dwelling place or place of general abode apart from her husband. The District

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having been requested to take an oath . . . pronounced the following words:

"'*I, Rosetta Andrus Sorge, born an American citizen, declare I renounce and in truth do renounce my American citizenship, and swear to be faithful to H. M. the King of Italy and Albania, Emperor of Ethiopia, to his royal successors, and to loyally observe the statutes and other laws of the Kingdom of Italy.*'" (Emphasis supplied.)

Court, however, found that, at the times of signing her application for Italian citizenship and the instrument containing her oath of allegiance to the King of Italy, she did not intend to establish a "permanent residence" in any country other than the United States. It found also that when she left America for Italy, "she did so without any intention of establishing a permanent residence abroad or abandoning her residence in the United States, or of divesting herself of her American citizenship." See 73 F. Supp. at 110.

We thus face two principal questions:

I. What was the effect upon the petitioner's American citizenship of her applying for and obtaining Italian citizenship? The Government contends that she thereby was naturalized in a foreign state in conformity with its laws within the meaning of either § 2 of the Act of 1907 or § 401 (a) of the Act of 1940.[4] It contends further that § 2 of the Act of 1907 did not require residence abroad as a condition of expatriation, and that she, therefore, was, then and there, effectively expatriated under that Act, merely upon becoming naturalized as an Italian citizen while still remaining in the United States. We agree that she was thus naturalized, but we do not find it necessary to pass upon the further contention that, by obtaining such naturalization in 1940, she then and there expatriated herself, and lost her American citizenship without taking up residence abroad.[5]

II. What was the effect upon the petitioner's American citizenship of her residence in Italy from 1941 to 1945? The Government contends that, even if the petitioner did not lose her American citizenship, in 1940, when she

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[4] See notes 1 and 2, *supra.*

[5] The Government further claims that the petitioner's signing of the instrument containing her oath of allegiance to the King of Italy was an oath of allegiance to a foreign state within the meanings of § 2 of the Act of 1907, and of § 401 (b) of the Act of 1940. We agree.

became a naturalized Italian citizen, she lost it when she took up her residence in Italy. We agree. The Government contends that this expatriation was effected either under the Act of 1940 [6] or under the Act of 1907 as continued in effect by a saving clause in the Act of 1940.[7] We find it unnecessary to choose between these contentions because each leads to the same conclusion in this case.

I.

What was the effect upon the petitioner's American citizenship of her applying for and obtaining Italian citizenship?

The requirements for expatriation under § 2 of the Citizenship Act of 1907 are objective.[8] That section provides that "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." [9]

Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people.[10] Denial, restriction, impairment or questioning

[6] See note 2, *supra.*

[7] Section 347 (a) of the Act of 1940 is set out in full in note 20, *infra.*

[8] The same is true of the requirements for expatriation under §§ 401 (a) and (b) and 403 (a) of the Nationality Act of 1940. See notes 1 and 2, *supra.* See also, *Bauer* v. *Clark,* 161 F. 2d 397 (C. A. 7th Cir.); *Reynolds* v. *Haskins,* 8 F. 2d 473 (C. A. 8th Cir.); *United States ex rel. De Cicco* v. *Longo,* 46 F. Supp. 170 (Conn.); *United States ex rel. Wrona* v. *Karnuth,* 14 F. Supp. 770 (W. D. N. Y.).

[9] For full text, see note 1, *supra.*

[10] *The Santissima Trinidad,* 7 Wheat. 283; *Murray* v. *The Charming Betsy,* 2 Cranch 64; *Case of Isaac Williams,* opinion of Ellsworth, C. J., see 2 Cranch 82–83, n.; *Talbot* v. *Janson,* 3 Dall. 133; *Ex parte Griffin,* 237 F. 445 (N. D. N. Y.); *Comitis* v. *Parkerson,* 56 F. 556 (C. C. E. D. La.); 14 Op. Atty. Gen. 295 (1872–1874); 8 Op. Atty. Gen. 139 (1856–1857).

of that right was declared by Congress, in 1868, to be inconsistent with the fundamental principles of this Government.[11] From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation. However, due to the common-law prohibition of expatriation without the consent of the sovereign, our courts hesitated to recognize expatriation of our citizens, even by foreign naturalization, without the express consent of our Government.[12] Congress finally gave its consent upon the specific terms stated in the Citizenship Act of 1907 and in its successor, the Nationality Act of 1940. Those Acts are to be read in the light of the declaration of policy

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[11] "WHEREAS the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendents, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." 15 Stat. 223–224, R. S. § 1999, 8 U. S. C. § 800.

The above language, when enacted, was intended to apply especially to immigrants into the United States. It sought to emphasize the natural and inherent right of such people to expatriate themselves from their native nationalities. It sought also to secure for them full recognition of their newly acquired American citizenship. The language is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves.

[12] See note 10, *supra.*

favoring freedom of expatriation which stands unrepealed. 3 Hackworth, Digest of International Law §§ 242–250 (1942).

A. One contention of the petitioner is the novel one that her naturalization did not meet the requirements of § 2 of the Act of 1907,[13] because it did not take place within the boundaries of a foreign state. The answer is that the phrase in § 2 which states that "any American citizen shall be deemed to have expatriated himself when he has been naturalized *in* any foreign state in conformity with its laws, . . ." (emphasis supplied) refers merely to naturalization into the citizenship of any foreign state. It does not refer to the place where the naturalization proceeding occurs. The matter is even more clearly dealt with in the Act of 1940.[14] Section 401 (a) there lists "Obtaining naturalization in a foreign state, . . ." as a means of losing nationality. Section 403 (a) then states that expatriation shall result from the performance of the acts listed in § 401 "within the United States . . ." if and when the national performing them "thereafter takes up a residence abroad." Thus Congress expressly recognized that "naturalization in a foreign state" included naturalization proceedings which led to citizenship in a foreign state, but took place within the United States.

B. The petitioner's principal contention is that she did not intend to give up her American citizenship, although she applied for and accepted Italian citizenship, and that her intent should prevail. However, the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively.[15] There is no suggestion in the statutory language that the effect of the specified overt

[13] See note 1, *supra.*

[14] See note 2, *supra.*

[15] See note 8, *supra.*

acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

The United States has long recognized the general undesirability of dual allegiances. Since 1795, Congress has required any alien seeking American citizenship to declare "that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, whereof he was before a citizen or subject; . . . ." 1 Stat. 414, see 8 U. S. C. § 735 (a).[16] Temporary or limited duality of citizenship has arisen inevitably from differences in the laws of the respective nations as to when naturalization and expatriation shall become effective. There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.[17]

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[16] The present statute requires an oath in the following form:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature." 54 Stat. 1157, 8 U. S. C. § 735 (b).

[17] See 3 Hackworth, Digest of International Law §§ 243, 244 (1942).

The Citizenship Board of 1906, appointed by the Secretary of State, proposed the expatriation provisions of the Act of 1907, and said in support of them:

"It is true that because of conflicting laws on the subject of citizenship in different countries a child may be born to a double allegiance;

This Court, in interpreting § 3 of the Act of 1907 as it existed from 1907 to 1922, has passed upon substantially this question. Section 3 then provided that "any American woman who marries a foreigner shall take the nationality of her husband." 34 Stat. 1228, repealed in 42 Stat. 1022. While that provision was in effect, a woman who was a native-born citizen of the United States married a subject of Great Britain residing in California. The woman had not intended to give up her American citizenship. On being advised that she had done so, she sought a writ of mandamus to compel the

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but no man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one." H. R. Doc. No. 326, 59th Cong., 2d Sess. 23 (1906–1907).

Similarly, the legislative history of the Nationality Act of 1940 contains no intimation that subjective intent is material to the issue of expatriation. On the other hand, it makes it clear that the relevant provisions of the new Act are a restatement of those in § 2 of the Act of 1907, and of the historic policy of the United States. Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess. 489, 408 (1940).

In § 401 of the Act of 1940, Congress added a number of *per se* acts of expatriation. These included, among others, entering the armed forces of a foreign state, accepting office in a foreign state to which only nationals of such state were eligible, and voting in a political election of a foreign state. Lack of intent to abandon American citizenship certainly could not offset any of these. *A fortiori* a mature citizen who accepted naturalization into the full citizenship of a foreign state could not have been intended by Congress to have greater freedom to establish duality of citizenship.

Congress found it necessary after World War I to enact special legislation to assist men to regain their American citizenship after they had expatriated themselves by taking a foreign oath of allegiance required to permit them to enlist in the armies of certain foreign nations. 40 Stat. 340, 542 *et seq.* See 55 Cong. Rec. 6935, 7665–7666 (1917); S. Rep. No. 388, 65th Cong., 2d Sess. 7–8 (1917–1918); H. R. Rep. No. 532, 65th Cong., 2d Sess. 3–4 (1917–1918); 56 Cong. Rec. 6008–6009, 6011–6012 (1917–1918).

local Board of Elections to register her as a voter and she showed that she had the necessary qualifications for registration, provided she established her American citizenship. The Court held that, during her coverture, her expatriation was binding upon her as the statutory consequence of her marriage to a foreigner in spite of her contrary intent and understanding as to her American citizenship. She accordingly was denied relief. *Mackenzie* v. *Hare,* 239 U. S. 299. See also, *Ex parte Griffin,* 237 F. 445 (N. D. N. Y.). Cf. *Perkins* v. *Elg,* 307 U. S. 325.

The petitioner, in the instant case, was a competent adult. She voluntarily and knowingly sought and obtained Italian citizenship.[18] Her application for naturalization and her oath of allegiance were in Italian, which she did not understand, but Savorgnan did understand Italian, and he was with her and able to translate and explain them to her when she signed them. She knew that the instruments related to her citizenship and that her signature of them was an important condition upon which her marriage depended. She thus was as responsible for understanding them as if they had been in English. On that basis, she was married. Whatever the legal consequences of those acts may be, she is bound by them.

C. The Government contends vigorously that the petitioner's Italian naturalization, in 1940, then and there expatriated her. It contends that this provides sufficient basis, under the Act of 1907, to affirm the decision of the

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[18] ". . . the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress." *Doreau* v. *Marshall,* 170 F. 2d 721, 724 (C. A. 3d Cir.); but see, in cases of real duress, *Dos Reis* v. *Nicolls,* 161 F. 2d 860 (C. A. 1st Cir.); *Schioler* v. *United States,* 75 F. Supp. 353 (N. D. Ill.); *In re Gogal,* 75 F. Supp. 268 (W. D. Pa.).

Court of Appeals without reference to the petitioner's subsequent residence abroad. While recognizing the force of this alternative ground for affirmance, we do not rest our decision upon it. It is, however, entitled to be noted. The Government's argument is that, while residence abroad may have been required before the Act of 1907 and is now expressly required by the Act of 1940, it was not required under the Act of 1907. See *Mackenzie* v. *Hare,* 239 U. S. 299. The Government concedes, however, that, at least since 1933, the State Department has considered residence abroad to be a necessary element of expatriation. 3 Hackworth, Digest of International Law §§ 242–250 (1942). In our view, the petitioner's residence abroad from 1941 to 1945 makes it unnecessary to determine, in this case, what would have been her status if she had not taken up her residence abroad. We accordingly do not do so.

II.

What was the effect upon the petitioner's American citizenship of her residence in Italy from 1941 to 1945?

A. The Nationality Act of 1940, including its repeal of § 2 of the Citizenship Act of 1907, took effect January 13, 1941.[19] The petitioner's residence abroad began after that date. It is contended that the effect of such residence may be determined either by the terms of the Act of 1940, or by those of the Act of 1907 continued in force by a saving clause in the Act of 1940.[20] We find, how-

[19] See §§ 504, 601 of the Act of 1940, 54 Stat. 1172, 1174, 8 U. S. C. §§ 904, 906.

[20] It is apparent that Congress did not intend to leave a gap in the statutory coverage of acts of expatriation.

"SEC. 347. (a) Nothing contained in . . . chapter V [including § 504 which expressly repealed § 2 of the Act of 1907] of this Act, unless otherwise provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization,

ever, that the petitioner's residence and her naturalization have the same effect whether or not resort is had to the saving clause. Accordingly, it is not necessary to determine here whether the petitioner's residence and naturalization are to be tested under the saving clause or under the rest of the Act of 1940.[21]

B. The petitioner's residence abroad met the requirements of the Act of 1940. Sections 403 (a) and 104 used the terms "residence" and "place of general abode" without mention of the intent of the person concerned.[22] The Act cleared up the uncertainties which had been left by early decisions as to the type and amount, if any, of residence abroad that was required to establish expatriation.[23] In contrast to such terms as: "temporary residence," "domicile," "removal, with his family and effects," "absolute removal" or "permanent residence," the new

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certificate of naturalization or of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any act, thing, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the statutes or parts of statutes repealed by this Act, are hereby continued in force and effect." 54 Stat. 1168, 8 U. S. C. § 747 (a).

Section 504 also included the following clause: "The repeal herein provided shall not terminate nationality heretofore lawfully acquired, nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party." 54 Stat. 1174, 8 U. S. C. § 904.

[21] Section 403 (a) of the Act of 1940 (see note 2, *supra*) may apply to antecedent naturalizations and oaths of allegiance, as well as to future ones. "A statute is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox* v. *Hart,* 260 U. S. 427, 435. See also, *Reynolds* v. *United States,* 292 U. S. 443; *United States* v. *Bradley,* 83 F. 2d 483 (C. A. 7th Cir.); *United States ex rel. Rojak* v. *Marshall,* 34 F. 2d 219 (W. D. Pa.); 39 Op. Atty. Gen. 474 (1937–1940).

[22] See note 2, *supra.*

[23] See note 10, *supra.*

Act used the term "residence" as plainly as possible to denote an objective fact.[24] To identify the required "place of residence," it required only that it be the "place of general abode." Confirmation of this intended simplification appears in the Report on Revision and Codification of the Nationality Laws of the United States, submitted by the Secretary of State, Attorney General and Secretary of Labor to Congress on the bill which became the Nationality Act of 1940:

> "Definitions of 'residence' frequently include the element of intent as to the future place of abode. However, in section 104 hereof no mention is made of intent, and the actual 'place of general abode' is the sole test for determining residence. The words 'place of general abode,' which are taken from the second paragraph of section 2 of the Citizenship Act of March 2, 1907 (34 Stat. 1228), seem to speak for themselves. They relate to the principal dwelling place of a person." [25]

The District Court did not find that the petitioner failed to take up an actual residence or place of general abode abroad. It found merely that in "July 1941 *when she left this country for Italy* she did so without any intention of establishing *a permanent residence abroad or abandoning her residence in the United States, ...*" (Emphasis supplied.) See 73 F. Supp. at 110. Under the Act of 1940, the issue is not what her intent was on leaving the United States, nor whether, at any later time, it was her intent to have a permanent residence abroad or to have a residence in the United States. The issue

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[24] Where "permanent residence" was intended, the statute used that term. *E. g.*, §§ 308 and 407 of the Act of 1940, 54 Stat. 1143, 1170, 8 U. S. C. §§ 708, 807.

[25] Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess. 417 (1940).

is only whether she did, at any time between July, 1941, and November, 1945, in fact "reside" abroad. The test of such "residence" is whether, at any time during that period, she did, in fact, have a "principal dwelling place" or "place of general abode" abroad. She testified that, from 1941 to 1945, she lived with her husband and his family in Rome, except for six months' internment in Salzburg, Germany. Whatever may have been her reasons, wishes or intent, her principal dwelling place was in fact with her husband in Rome where he was serving in his Foreign Ministry. Her intent as to her "domicile" or as to her "permanent residence," as distinguished from her actual "residence," "principal dwelling place," and "place of abode," is not material. She expatriated herself under the laws of the United States by her naturalization as an Italian citizen followed by her residence abroad.[26]

The judgment of the Court of Appeals, accordingly, is affirmed, and the case is remanded to the District Court with directions to dismiss the petition against the United States and to enter judgment in favor of the other defendants in conformity with this opinion.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK joins, is of opinion that the judgment of the District

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[26] If the test is to be made under the saving clause quoted in note 20, *supra*, that may mean that the need and character of her residence are to be determined under the Act of 1907. Under the contention of the Department of Justice no residence abroad would be required. Under the practice of the Department of State some residence abroad would be required. 3 Hackworth, Digest of International Law §§ 242–250 (1942). But we believe that the provisions of §§ 403 (a) and 104 of the Act of 1940 substantially reflect the requirements of that residence.

Court should be reinstated. Law of course determines the legal consequences of conduct. But both the Citizenship Act of 1907 and the Nationality Act of 1940 raise issues of fact, and the District Court allowably found the facts in favor of the petitioner. Since expatriation does not follow on the basis of such finding, the judgment of the District Court should not have been disturbed. 73 F. Supp. 109.

DICKINSON *v.* PETROLEUM CONVERSION CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 150. Argued December 5, 1949.—Decided January 16, 1950.

1. In April 1947 the District Court, after hearing, entered a decree in a civil proceeding in which the respondent corporation and others had been allowed to intervene. The decree granted part of the relief prayed by the corporation but dismissed its other claims. The court reserved jurisdiction as to matters which were of concern to other intervenors but which could not possibly affect the corporation. In August 1948 a "final decree" was entered, which did not in any way change the 1947 decree as to the corporation. *Held:* As to the corporation, the 1947 decree was an appealable final decree; its failure to appeal therefrom forfeited its right of review; and appeal from the 1948 decree was ineffective and should be dismissed. Pp. 508–516.
2. Rule 54 (b) of the Federal Rules of Civil Procedure not having been in effect at the time of the 1947 decree, this Court does not determine its effect on cases of this kind. P. 512.

173 F. 2d 738, reversed.

A motion to dismiss an appeal by a corporation from a decree of the District Court, on the ground that as to the corporation an earlier decree was final and appealable, was denied by the Court of Appeals. 173 F. 2d 738. This Court granted a limited certiorari. 338 U. S. 811. *Reversed,* p. 516.

Solomon Kaufman and *Samuel Hershenstein* submitted on brief for petitioner.

Alexander Kahan argued the cause and filed a brief for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The only issue presented by this case turns on the finality of a judgment for purposes of appeal, a subject on which the volume of judicial writing already is formidable. The Court of Appeals resolved against finality of the decree in question, saying, however, that it did so against the unanimous conviction of the court as constituted but in deference to a precedent established by a differently constituted court of the same Circuit. 173 F. 2d 738. Because of this intracircuit conflict, we made a limited grant of certiorari. 338 U. S. 811. That we cannot devise a form of words that will settle this recurrent problem seems certain; but in this case we agree with the convictions of the court below and reverse its judgment.

Something over a decade ago, Dickinson sued Lloyd, with whom he had been associated in promoting the Petroleum Conversion Corporation, along with others, to impress an equitable lien upon certain of the Corporation's shares then in Lloyd's name and possession. The District Court dismissed the complaint but the Court of Appeals reversed and directed a new trial. *Dickinson* v. *Rinke,* 132 F. 2d 805. Before retrial, Burnham and Vaughan, on behalf of themselves and such other stockholders as subscribed to a fund to aid the company or its predecessor in its embarrassment, were allowed to intervene. They set up a claim against both plaintiff Dickinson and defendant Lloyd that the stock involved in the controversy between them had been fraudulently issued and demanded that this stock be canceled. They

also sought recovery of $87,310.28 from them as unlawful profits secretly realized by breach of their fiduciary duty. Petroleum Conversion Corporation also intervened, making the same general allegations and demands for relief. The Corporation and the class of subscribers thus joined forces to get for one or the other substantially the same remedy against both Dickinson and Lloyd.

This triangular controversy was tried and a decree dated April 10, 1947, was entered. The issue here turns on the character of that decree. It recites twenty-three days of trial, the filing of a decision, opinion, findings of fact and conclusions of law, and it "ordered, adjudged and decreed" that all of the plaintiff Dickinson's claims be dismissed on the merits; that all of the defendant Lloyd's claims there pressed by his administrator be dismissed on the merits; that the class intervenors have judgment of $174,620.56 against both Dickinson and Lloyd's administrator, and that a concourse of all these subscribers be provided by which their several claims could be liquidated and the share of each in the recovery fixed; that Petroleum Conversion Corporation receive 8,200 shares of its stock in the hands of Lloyd's administrator but that its claim to 12,596 additional such shares and its claim to over 244,000 of its shares in possession of the court be dismissed; and Petroleum Conversion Corporation was directed to issue new shares to stockholders of another corporation, provided that, if any shares were not distributed for any reason, they be redeposited with the court subject to its further order with jurisdiction retained by the court to supervise the distribution of such shares. It dismissed all other claims of Petroleum Conversion Corporation.

From this decree Petroleum took no appeal. The District Court went ahead with hearings to determine claims of over seventy members of the class to share in the aggregate recovery against Dickinson and Lloyd's adminis-

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trator. On August 3, 1948, the court signed a "final decree" which apportioned the recovery as between those claimants. It recited that "the issues reserved in the decree herein dated the 10th day of April, 1947, having been determined by the Court . . . the said decree is hereby made final." It made no decision as to any issue involving Petroleum and in no way changed the 1947 decree as to it. It also awarded costs which had not been settled in the earlier decree, but made no award against Petroleum.

Thereupon Petroleum's receiver in bankruptcy appealed from so much of this 1948 decree as dismissed the claims of Petroleum.[1] On motion to dismiss the appeal, the chief question and the only one we granted review, was whether the Corporation could have appealed from the 1947 decree, or whether it could only appeal from the 1948 decree.[2] In deciding this motion, the court said:

> "In the view of all members of the court, as it is now constituted, this should make no difference for the whole counterclaim of the Petroleum Conversion Corporation had been finally disposed of on April tenth, 1947; and as to it the action was at an end as much as though it had been denied the right to intervene at all; indeed, the judgment was more final, so to say, because, unlike the denial of a petition to intervene, it was a bar to any effort to relitigate the claims determined." 173 F. 2d at 740.

But because it could find no basis for distinguishing *Clark* v. *Taylor*, 163 F. 2d 940, in which a differently composed

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[1] As we have already indicated, however, the 1948 decree did not dismiss or decide any of Petroleum's claims except insofar as it may be construed to finalize the 1947 decree.

[2] If the 1947 decree was final as to Petroleum for purposes of appeal, Petroleum could not appeal from the 1948 decree. *Hill* v. *Chicago & Evanston R. Co.*, 140 U. S. 52.

court in the same Circuit had sustained what appears to be a contrary position, it held the earlier order not appealable and hence no bar to the present appeal. 173 F. 2d at 740–741.

Half a century ago this Court lamented, "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." *McGourkey* v. *Toledo & Ohio Cent. R. Co.*, 146 U. S. 536, 544–45. This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.[3]

The liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention by those not originally parties has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had. In recognition of this difficulty, present Rule

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[3] The cases and the policy considerations underlying them are collected and discussed in 3 Moore's Federal Practice, 1948 Supp., 172–187; Moore's Commentary on the U. S. Judicial Code, 495–501, 507–518 (1949); Note to Rule 54 (b), Advisory Committee's Report of Proposed Amendments to Rules of Civil Procedure (1946); Reformulation of the "Final Decision" Rule—Proposed Amendment to Rule 54 (b), 56 Yale L. J. 141; The Final Judgment Rule in the Federal Courts, 47 Col. L. Rev. 239; Federal Rule 54 (b) and the Final Judgment Rule, 47 Mich. L. Rev. 233.

54 (b), Federal Rules of Civil Procedure, was promulgated. It provides:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

The obvious purpose of this section, as indicated by the notes of the advisory committee, is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here.[4] It provides an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly.

But this new rule—which became effective on March 19, 1948—was not in effect at the time of the 1947 decree in this case and it would not be appropriate to attempt to determine its effect on cases of this kind beyond observing that it may do much to prevent them from coming here. We will not, therefore, try to lay down rules to embrace any case but this.

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[4] Note to Rule 54 (b), Advisory Committee's Report of Proposed Amendment to Rules of Civil Procedure (1946) 70–72. See also authorities cited in n. 3, *supra*.

We have held that an order denying intervention to a person having an absolute right to intervene is final and appealable. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519; *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502. When the application for intervention is denied, the would-be intervenor is foreclosed from further action in the case and its proceedings cannot affect him nor can he affect them. As the court below observed, it is hard to see why the exclusion of an intervenor from the case should be less final when it is based upon the evidence than when it is based upon pleadings. In either case, the lawsuit is all over so far as the intervenor is concerned.

When its claims were dismissed by the decree of April 1947, any grievance that Petroleum Conversion Corporation had was fully matured.[5] At that point Petroleum

[5] While it should make no difference as to the law that governs finality, it is fair to the law and to the court to dispel the impression that this decision makes the creditors of Petroleum Conversion Corporation "victims of this jungle of doubt," or victims of any kind, or that they are in this predicament from a "failure to guess right on a legal question." This calls for some further detail irrelevant to the issue of law.

The decree of April 10, 1947, awards the recovery of $176,245.24, with interest from 1926, to the Rinke Agency Subscribers, as their several shares might be determined. These were the persons who in 1926 put up the funds, amounting to some $600,000, out of which Dickinson and Lloyd withdrew secret profits in breach of their fiduciary duty to those subscribers. The Petroleum Conversion Corporation had not been organized at the time of this breach of faith and its claim was derived from its predecessor corporation for the financial relief of which this fund was subscribed.

It will thus be seen that Petroleum Conversion's claims as to the existence of fraud and secret illegal profits were not based upon any depletion of its own treasury, but of a separate fund subscribed, of which it might ultimately be a beneficiary. The repayment of the secret profits was awarded to those who had put up the money of which they had been defrauded and was not awarded to the Corporation. The decree which it now wants to review was entered

was out of the case. The decree was not tentative, informal nor incomplete as to it; and the case was concluded and closed as to its counterclaims. The court's reservation of jurisdiction to supervise the distribution

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on motion of Petroleum's own attorney. Its interests and those of the intervening subscriber class were handled by the same attorney at the trial. A single brief and proposed findings of fact and conclusion of law were jointly submitted by Petroleum and other intervenors to the trial court, which left it to the court, if recovery were allowed, whether the judgment should be in favor of the Corporation or the subscribers. The court decided the recovery belonged to the subscribers. It was deliberately decided not to appeal the court's dismissal of Petroleum's claims under these circumstances.

The attorney now seeking to prosecute an appeal sought in March of 1948 to intervene in District Court on behalf of preferred stockholders. He attacked this cooperation between counsel for the two intervenors and particularly the failure of counsel to appeal the April 10, 1947 decree. As to this charge, the trial judge said: "In so far as their petition for leave to intervene is based on the charge that the corporation's [Petroleum Conversion Corporation] rights in respect to the $176,000 claim have not been fully and honestly presented, the history of this litigation, as set forth in the Court's opinion of October, 1946, and the trial record show that any such charge is baseless." It was in that connection that the trial court suggested that "In my opinion it was not a final decree and was not appealable, at least in so far as it involved the claim for $176,000." But the time to appeal was then long past and failure to appeal was not influenced by this statement, nor, so far as appears, by any bewilderment as to the finality of the decree. No appeal was prosecuted because counsel who had fought and won the principal issues in the case thought justice had been done by the decree as it stood.

After the final decree, counsel, having been thus criticized, filed on September 1, 1948, a notice of appeal from the final decree. This was on behalf of the trustee for Petroleum, which meanwhile was adjudged bankrupt.

But the trustee at once laid the inadvisability of the appeal before the bankruptcy court. He advised the court that "The Trustee is satisfied from his investigation that Judge Leibell had sufficient evidence and supporting authorities for finding as he did and believes that an appeal to the Court of Appeals would probably be fruitless." He pointed out that the attorney who now proposes to prosecute the

of the shares of stock and the provision for further proceedings to determine the individual shares in the aggregate recovery allowed did not in any manner affect Petroleum's rights. What the court reserved was essentially supervisory jurisdiction over the distribution among the class of the recovery awarded the intervenors as the class' representatives. The only questions were, so to speak, internal to the intervening interest. Petroleum no longer had any concern with these questions and, however they were resolved, Petroleum could not possibly have been affected. The court obviously selected with deliberation the issues it would close by the decree and those it would reserve for future decision. If it had any purpose to leave open any issue concerning Petroleum's

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appeal had objected to its abandonment, but reported that "The Trustee accordingly proposes not to prosecute said appeal and petitions the approval of this court." Notice was given to all creditors of the Corporation and, "no creditors having objected to the recommendations of the trustee," it was approved. It was provided, however, that, if any creditor desired to prosecute the appeal, without liability upon the bankrupt's estate for costs or expenses unless the appeal was successful, he might do so under § 64 (a) (1) of the Bankruptcy Act. 60 Stat. 330, 11 U. S. C. § 104 (a) (1).

Thereafter, permission so to prosecute this appeal was granted. Counsel has also moved to amend both the notice of appeal and the pleadings, without which he claims the appeal might be irreparably prejudiced. What new issues he would raise we cannot learn from the record before us.

Some of us are unable to see that this case exemplifies any such injustice in the rule of finality that the practice should be remolded to allow an appeal from either decree in order to save this appellant.

The judgment required repayment of money to seventy and more claimants who were defrauded of it in 1926. The purpose of the appellant is to divert this same money recovery through the trusteeship of a bankrupt corporation, where it would be subject to renewed litigation as to how it shall be distributed and to multiple fees. If the rule of finality we apply means that amends for a 1926 fraud shall be concluded as early as 1950, we do not think that condemns the rule as unjust.

contentions, or affecting its interests, half a line in the decree would have done so. But that half-line was not written.

We hold the decree of April 10, 1947, to have been a final one as to Petroleum [6] and one from which it could have appealed and that its failure to appeal therefrom forfeits its right of review. Its attempt to review the earlier decree by appealing from the later one is ineffective, and its appeal should be dismissed.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

The right to appeal a judgment has long been said to depend on whether it is "final." This is a simple question where a court decides all issues simultaneously and enters a final order putting an end to a controversy. But when an order apparently leaves some question or claims open for further court action at a later date, doubts as to finality arise. See, *e. g., Hohorst* v. *Hamburg-American Packet Co.,* 148 U. S. 262. Finality and ap-

[6] The parties have not tendered to this Court, and we did not take by certiorari, any issue as to any appeal by Dickinson. What its fate will be if such an appeal is pending we do not know and the record is not compiled to inform us of its merits. Dickinson, we only know, was a party to the original action; not as Petroleum, an intervenor. The last decree of the court, we know too, awarded costs against him which the former decree did not. And it awarded against him money judgments for specific amounts in favor of particular claimants, whereas the earlier decree adjudged only a general liability to a class. The Court of Appeals will be able to deal with any contentions that the Dickinson appeal should be dismissed, and until it has acted, we draw no inferences from obviously incomplete information on unlitigated issues.

pealability have provided judges, lawyers, and commentators with a perpetual subject for debate.[1] But litigants have too often been thrown out of court because their lawyers failed to guess that an order would be held "final" by an appellate court. The creditors of Petroleum Conversion Corporation, who are prosecuting this action for respondent here, are not the first victims of this jungle of doubt.[2] I also doubt that they will be the last victims, despite the Court's hope that the new Rule 54 (b) has charted a clear route through the jungle.

I see no practical reason why the Court of Appeals should not have been free to review the respondent's challenge to the 1948 decree without regard to appealability of the 1947 decree. A rational system of jurisprudence should not attach inexorable consequences to failure to guess right on a legal question for the solution of which neither statutes nor court opinions have provided even a reasonably certain guide. Where, as here, arguments as to which of two decrees is "final" may be considered relatively even, an appellate court should be free to find "finality" in either decree appealed from. Under such a rule a court could consider the many circumstances relevant to orderly appellate administration without penalizing litigants merely because it finds that an earlier

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[1] See, *e. g.*, Judge Frank, dissenting in *Clark* v. *Taylor*, 163 F. 2d 940, 944–953. See also Crick, *The Final Judgment As a Basis for Appeal*, 41 Yale L. J. 539; Note, *Finality of Judgments In Appeals From Federal District Courts*, 49 Yale L. J. 1476.

[2] The corporation was adjudicated bankrupt in August 1948. On September 1, 1948, the temporary receiver (later appointed trustee) filed an appeal from the 1948 decree. Subsequently he refused to prosecute the appeal, but the bankruptcy court accepted his recommendation that creditors be allowed to do so without expense to the estate. By today's decision the creditors of the bankrupt corporation, who were not represented in the trial below, are deprived of their only opportunity to appeal.

decree falls on the "finality" side of what remains a twilight zone. *Cf. Davis* v. *Department of Labor,* 317 U. S. 249. See also dissent in *Morgantown* v. *Royal Ins. Co.,* 337 U. S. 254, 263–264.

Even if the old "either-or" rule is applied as to appealability of the 1947 and 1948 decrees here, it seems to me that weightier reasons support holding the latter final. The judge who tried the case and rendered both decrees attributed finality to the decree of 1948 and not to that of 1947. He termed the 1947 order a "Decree," the 1948 order a "Final Decree." He specifically provided in the 1947 decree "That the taxation of costs in this case and the entry of judgment therefor, be deferred until the entry of judgment in respect to the matters hereinabove reserved for the future determination of this Court." At his order, both Petroleum and Dickinson received notice of subsequent hearings. Four months before the final 1948 decree the trial judge in a memorandum opinion referred to the 1947 decree as "interlocutory." Answering contentions that respondent here should have appealed from the 1947 decree, he stated: "In my opinion it was not a final decree and was not appealable, at least in so far as it involved the claim for $176,000." And in the 1948 decree the trial judge for the first time declared that the 1947 decree "is hereby made final." [3] The creditors prosecuting this appeal for respondent should not be deprived of an opportunity to appeal from the 1948 decree just because attorneys for the corporation failed to appeal from a former decree which the trial

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[3] Paragraph 3 of the 1948 decree reads:

"That the issues reserved in the decree herein dated the 10th day of April, 1947, having been determined by the Court in its decision and opinion and its Findings of Fact and Conclusions of Law filed herein dated the 24th day of July, 1948, the said decree is hereby made final."

judge himself seems to have considered interlocutory and nonappealable.[4]

The holding that Petroleum's appeal from the 1948 judgment must be dismissed may well produce a strange consequence. The reason for dismissal urged here by petitioner Dickinson is that the 1947 decree was final; under his contention, that decree left nothing for the trial court to do except determine the shares of various "Rinke subscribers" in "the particular sum" found due to that class from Lloyd and Dickinson, and to assess costs and enter judgment. On this hypothesis the 1947 decree seems just as final on Dickinson's claims and liability as on Petroleum's. The 1947 litigation originated in charges of fraud made by Dickinson against Lloyd. Petroleum and persons designated as "Rinke subscribers" then intervened, charging fraud against both Dickinson and Lloyd. The 1947 decree rested on findings that the charges against Dickinson and Lloyd had been proven. The court concluded that the Rinke subscribers, and to some extent Petroleum, had been damaged by their fraud. Accordingly the court awarded partial relief to Petroleum on one of its claims, dismissing all its other claims. The court also fixed a particular amount for the Rinke subscribers as a group to recover from Dickinson and the Lloyd estate. That decree, here held final as to Petroleum, apparently had an identical degree of finality as to Dickinson: in addition to fixing the precise sum for which Dickinson and Lloyd were liable to Rinke subscribers as a group, it completely dismissed Dickinson's affirmative claims.[5] Yet

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[4] The creditors have contended that the interests of the corporation were not adequately represented at the trial because the corporation attorney regarded it as immaterial whether the corporation or Rinke subscribers obtained the recovery.

[5] The possible distinctions between finality as to Dickinson and as to Petroleum, listed by the court in footnote 6 of its opinion, seem

Dickinson himself has appealed from the 1948 decree,[6] and ironically enough he is the only party here urging dismissal of Petroleum's appeal from the same decree.

So far as we know, Dickinson's appeal is still pending. With Petroleum out of the case by this Court's judgment, he should certainly not be left free to have his own appeal considered in the Court of Appeals. Permitting him to challenge the 1947 findings would result in appellate review of that decree without the presence of Petroleum, who was one of Dickinson's 1947 adversaries. If Dickinson can challenge the 1947 decree by appeal from the 1948 judgment, Petroleum should also be allowed to challenge it. And if neither can challenge it, the basic questions of fraud and liability are now beyond the reach of appellate review. I cannot join the Court in applying a rule of "finality" which attaches such consequences to the understandable failure of these parties to appeal from the 1947 decree.

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unsubstantial. That Petroleum entered the cases as an intervenor is immaterial; having litigated its claims and being bound by the judgment, it is just as much a party as Dickinson. The 1948 decree could have awarded costs against Petroleum as easily as against Dickinson, since the 1947 decree expressly reserved the question of costs as to all parties. And the extent of Dickinson's liability, adjudicated in the 1947 decree, was in no way altered by the 1948 decree allocating recovery among the Rinke subscribers.

[6] Lloyd's Administrator is listed in the Court of Appeals opinion as "appellee-appellant."

UNITED STATES EX REL. EICHENLAUB *v.* SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION.

NO. 3. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued November 16–17, 1949.—Decided January 16, 1950.

At a time when he was a naturalized citizen of the United States, a person was convicted of a conspiracy to violate the Espionage Act of 1917. Thereafter, in a denaturalization proceeding, his citizenship was revoked and his certificate of naturalization was canceled on the ground that he had procured it by fraud. Thereafter, he was ordered deported under the Act of May 10, 1920, which provided for the deportation of "aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate" the Espionage Act of 1917 and who are found to be "undesirable residents" of the United States. *Held:* His deportation was authorized by the 1920 Act. Pp. 522–533.

(a) The Act of May 10, 1920, is not limited to aliens who never have been naturalized, nor does it exempt persons whose certificates of naturalization have been canceled for fraud in procurement. P. 528.

(b) Congress may validly provide for the deportation of aliens on grounds of past misconduct. P. 529.

(c) The Act of May 10, 1920, does not require that an alien whose deportation it authorizes shall have had the status of an alien at the time of the conviction on which the order of deportation is based. Pp. 529–531.

(d) There is nothing in the legislative history of the Act of May 10, 1920, that suggests a congressional intent to distinguish between aliens who never had been naturalized and those who had obtained naturalization by fraud and lost it by court decree. Pp. 531–533.

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*Together with No. 82, *United States ex rel. Willumeit* v. *Shaughnessy, Acting District Director, Immigration and Naturalization,* also on certiorari to the same court.

(e) The Act of May 10, 1920, is not rendered inapplicable to a conviction under the Espionage Act of 1917 by reason of the fact that in 1940 the penalty for violation of that Act was increased. P. 533, n. 20.

167 F. 2d 659, 171 F. 2d 773, affirmed.

In No. 3, the District Court dismissed a writ of habeas corpus in a proceeding challenging the validity of the relator's detention under a deportation order. The Court of Appeals affirmed. 167 F. 2d 659. An order of this Court denying certiorari, 335 U. S. 867, was subsequently vacated and certiorari was granted. 337 U. S. 955. *Affirmed,* p. 533.

In No. 82, the District Court dismissed a writ of habeas corpus in a proceeding challenging the validity of the relator's detention under a deportation order. The Court of Appeals affirmed. 171 F. 2d 773. This Court granted certiorari. 337 U. S. 955. *Affirmed,* p. 12.

George G. Shiya argued the cause and filed a brief for petitioner in No. 3.

Eugene H. Nickerson argued the cause and filed a brief for petitioner in No. 82.

Harold D. Cohen argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl.*

Mr. Justice Burton delivered the opinion of the Court.

These cases present the question of whether § 1 of the Act of May 10, 1920,[1] authorizes the deportation of an alien under the following circumstances occurring since that Act took effect:

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[1] 41 Stat. 593, see 8 U. S. C. § 157.

(1) The alien was naturalized; (2) while he was a naturalized citizen he was convicted of a conspiracy to violate the Espionage Act of 1917;[2] (3) thereafter, in a denaturalization proceeding, his citizenship was revoked and his certificate of naturalization canceled on the ground that he had procured it by fraud; and (4) the proper authority, after the required hearings, found the alien to be an undesirable resident of the United States and ordered him deported. For the reasons hereinafter stated, we hold that the Act authorizes such deportation.

No. 3—The Eichenlaub Case.

Richard Eichenlaub, the relator, was born in Germany in 1905, and entered the United States from there in 1930. He was naturalized as an American citizen in 1936, and has resided in the United States continuously since his reentry in 1937, when he returned from a visit to Germany. In 1941, on his plea of guilty in the United States District Court for the Eastern District of New York, he was convicted of conspiring to act as an agent for a foreign government without having been registered with the Secretary of State.[3] He was sentenced to imprisonment for 18 months and fined $1,000. In 1944, with his consent, a judgment was entered in the United States District Court for the Southern District of New York canceling his citizenship on the ground of fraud

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[2] Act of June 15, 1917, 40 Stat. 217.

[3] This was under § 37 of the general conspiracy statute, 35 Stat. 1096, 18 U. S. C. (1946 ed.) § 88, now 18 U. S. C. § 371; and under § 3 of Title VIII of the Espionage Act of 1917, 40 Stat. 226, 22 U. S. C. § 233, as amended by § 6 of the Act of March 28, 1940, 54 Stat. 80, 22 U. S. C. (1946 ed.) § 601, now 18 U. S. C. § 951. Several other defendants stood trial in this proceeding, and were convicted both on this and on a general espionage count. Their conviction was affirmed on this count, but reversed on the other. *United States* v. *Heine,* 151 F. 2d 813 (C. A. 2d Cir.).

in its procurement.[4] Deportation proceedings were then instituted against him[5] and, after a hearing before an Immigration Inspector and a review by the Board of Immigration Appeals, the Attorney General, in 1945, ordered his deportation.[6]

This proceeding for a writ of *habeas corpus* was then filed in the court last named. After hearing, the writ was dismissed and the dismissal was affirmed by the United States Court of Appeals for the Second Circuit. 167 F. 2d 659. We denied certiorari. 335 U. S. 867. However, when the Court of Appeals affirmed the *Willumeit* case, now before us, on the authority of this case, but called attention to the added impression which had been made upon it by the argument in favor of Willumeit on the point above stated, we vacated our denial of certiorari in this case and granted certiorari in both. 337 U. S. 955.

No. 82—The Willumeit Case.

In 1905, Otto A. Willumeit, the relator, was born in Lorraine, which at that time was a part of Germany,

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[4] Under § 338 of the Nationality Act of 1940, 54 Stat. 1158–1160, 8 U. S. C. § 738.

[5] Under § 1 of the Act of May 10, 1920, 41 Stat. 593–594, 8 U. S. C. § 157.

[6] Under the 1940 Reorganization Plan No. V, 54 Stat. 1238, the functions and powers of the Secretary of Labor under the Act of May 10, 1920, were transferred to the Attorney General. The warrant of deportation recited that the relator had been "found to be a member of the undesirable classes of alien residents enumerated . . ." in the Act of May 10, 1920. While the administrative file is not in the printed record, it was used in argument in the Court of Appeals and is on file here. The Board of Immigration Appeals at page 5 of its opinion found as a fact that the "respondent is an undesirable resident of the United States." The Court of Appeals, at 167 F. 2d 660, properly recognized this additional matter in the record as justifying its acceptance of the less specific finding recited in the warrant of deportation, and as distinguishing this case from *Mahler* v. *Eby*, 264 U. S. 32, 42–46, on that point.

but at the time of his arrest for deportation had become a part of France. He entered the United States from there in 1925. In 1931 he was naturalized, and he has resided in the United States continuously since his reentry in 1941 after a visit to Mexico. In 1942, on his plea of guilty in the United States District Court for the District of Connecticut, he was convicted of having conspired to violate that portion of the Espionage Act of 1917 which made it a crime to transmit to an agent of a foreign country information relating to the national defense of this country, with intent or reason to believe that such information would be used to the injury of the United States or to the advantage of a foreign nation.[7] He was sentenced to imprisonment for five years. In 1944, with his consent, a judgment was entered in the United States District Court for the Northern District of Illinois canceling his citizenship on the ground of fraud in its procurement.[8] Deportation proceedings were then instituted against him and, after a hearing before an Immigration Inspector and a review by the Board of Immigration Appeals, the Attorney General, in 1947, ordered his deportation.[9]

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[7] This conviction was under §§ 2 and 4 of Title I of the Act of June 15, 1917, 40 Stat. 218–219, 50 U. S. C. (1946 ed.) §§ 32 and 34, now 18 U. S. C. §§ 794 and 2388.

[8] See note 4, *supra*. In this record the final decree of denaturalization is set forth in full. Among other things, it states that the order admitting the relator to citizenship—

"is hereby vacated, annulled and set aside, and that the certificate of citizenship, . . . is hereby cancelled and declared null and void, . . . and the defendant Otto Albert Willumeit is hereby forever restrained and enjoined from setting up or claiming any rights or privileges, benefits or advantages whatsoever under said order, . . . or the certificate of citizenship issued by virtue of said order."

[9] The order was based not only upon § 1 of the Act of May 10, 1920, 41 Stat. 593–594, 8 U. S. C. § 157, the applicability of which in turn was based upon the relator's conviction of a violation of the Espionage Act of 1917, but also upon §§ 13 and 14 of the Immigra-

This proceeding for a writ of *habeas corpus* was filed in the United States District Court for the Southern District of New York and, after a hearing, the writ was dismissed. The United States Court of Appeals for the Second Circuit affirmed the dismissal on the authority of its decision in the *Eichenlaub* case.[10] 171 F. 2d 773.

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tion Act of 1924, 43 Stat. 161–162, as affected by 46 Stat. 581, 50 Stat. 165, the 1940 Reorganization Plan No. V, 54 Stat. 1238, and 60 Stat. 975, 8 U. S. C. §§ 213 and 214, having to do with relator's reentry into the United States from Mexico in 1941. The Court of Appeals found it unnecessary to pass on this alleged ground for deportation in view of its conclusion as to the other ground. 171 F. 2d at 775. We concur for the same reason.

As in the *Eichenlaub* case, the warrant of deportation apparently stated that it was based on the fact that the relator "has been found to be a member of the undesirable classes of alien residents . . . ." While the warrant is not printed in the record, the findings of the Commissioner of Immigration and of the Board of Immigration Appeals are printed in full. Each contains an express finding that the relator "is an undesirable resident of the United States." Each states reasons for so concluding.

[10] The return to the writ of *habeas corpus* in this case states that, in addition to issuing the above-described warrant of deportation, the Attorney General ordered the relator interned in 1945 as a dangerous alien enemy and, in 1946, ordered the relator removed from this country for that reason. That proceeding derives its authority from the Alien Enemy Act of July 6, 1798, 1 Stat. 577, as it appears in R. S. § 4067, as affected by 40 Stat. 531, and Presidential Proclamation No. 2655 of July 14, 1945, 3 C. F. R. 1945 Supp. 29; 59 Stat., Pt. 2, 870, see 50 U. S. C. § 21. It thus raises questions as to the "enemy" status of an alien born in Lorraine, which at the time of his birth was a part of Germany, but at the time of his arrest was a part of France. While the Government refers to this Act in its argument in interpreting the Act of May 10, 1920, as *in pari materia*, it does not press this arrest as a separate ground for dismissal of the writ of *habeas corpus*. See *United States ex rel. Zeller* v. *Watkins*, 167 F. 2d 279 (C. A. 2d Cir.); *United States ex rel. Gregoire* v. *Watkins*, 164 F. 2d 137 (C. A. 2d Cir.); *United States ex rel. D'Esquiva* v. *Uhl*, 137 F. 2d 903 (C. A. 2d Cir.); *United*

Because of the importance of the issue to American citizenship, we granted certiorari. 337 U. S. 955.

The proper scope of the Act of 1920 as applied to these cases is found in the ordinary meaning of its words. The material provisions of the Act are as follows:

> ". . . That aliens of the following classes . . . shall, upon the warrant of the [Attorney General], be taken into his custody and deported . . . if the [Attorney General],[11] after hearing, finds that such aliens are undesirable residents of the United States, to wit:
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> . . . . .
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> "(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:
>
> "(a) [The Espionage Act of 1917, as amended]." [12]

States ex rel. Umecker v. *McCoy,* 54 F. Supp. 679 (N. D.). The court below did not find it necessary to pass on this issue (171 F. 2d at 775), nor do we.

[11] See note 6, *supra.*

[12] The first paragraphs of the Act of May 10, 1920, are, in full, as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled 'An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

"(1) All aliens who are now interned under section 4067 of the Revised Statutes of the United States and the proclamations issued by the President in pursuance of said section under date of April 6,

The above words require that all persons to be deported under this Act shall be "aliens." [13] They do not limit its scope to aliens who never have been naturalized. They do not exempt those who have secured certificates of naturalization, but then have lost them by court order on the ground of fraud in their procurement. They do not suggest that such persons are not as clearly "aliens" as they were before their fraudulent naturalization.[14]

1917, November 16, 1917, December 11, 1917, and April 19, 1918, respectively.

"(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

"(a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918; . . . ." 41 Stat. 593–594, see 8 U. S. C. § 157.

The subsequent subdivisions (2) (b) to (h), inclusive, refer to the Explosives Act, 40 Stat. 385; Act Restricting Foreign Travel, 40 Stat. 559; Act Punishing Injury to War Material, 40 Stat. 533; Army Emergency Increase Act, 40 Stat. 80, 884, 955; Act Punishing Threats Against the President, 39 Stat. 919; Trading with the Enemy Act, 40 Stat. 411; and the Seditious Conspiracy Section of the Penal Code, 35 Stat. 1088.

[13] The word "alien" is not defined in the Act. It is, however, defined in closely related statutes. The Immigration Act of February 5, 1917, provides: "the word 'alien' wherever used in this Act shall include any person not a native-born or naturalized citizen of the United States; . . . ." 39 Stat. 874, see 8 U. S. C. § 173. The Immigration Act of May 26, 1924, provides: "The term 'alien' includes any individual not a native-born or naturalized citizen of the United States, ..." 43 Stat. 168, see 8 U. S. C. § 224. These definitions are in effect today. In Title 8 of the United States Code they are included in and are made to apply to the entire chapter on Immigration and that chapter includes as § 157 the Act of May 10, 1920.

[14] While the Act also makes no express distinction between its applicability to aliens who never have been naturalized and to those

There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct.[15] That is what Congress did in the Act of 1920, and there is no occasion to restrict its language so as to narrow its plain meaning.

The one substantial issue is whether the Act requires that the relators not only must have been "aliens" at the times when they were ordered deported, but that they must also have had that status at the times when they were convicted of designated offenses against the national security. The Government suggests that one route to a conclusion on this issue is to hold that the relators, as a matter of law, were "aliens" when so convicted. The basis it suggests for so holding is that the judicial annulment of the relators' naturalizations on the ground of fraud in their procurement deprived them of their naturalizations *ab initio*. *Rosenberg* v. *United States,* 60 F. 2d 475 (C. A. 3d Cir.). They thus would be returned to their status as aliens as of the date of their respective naturalizations. Accordingly, they would come within the scope of the Act of 1920, even if that Act were held to require that all offenders subject to deportation under it also must have had an *alien status when convicted* of the designated offenses.

In our opinion, it is not necessary, for the purposes of these cases, to give a retroactive effect to the denatu-

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who have been naturalized, but have lost their naturalized citizenship by lawful and voluntary expatriation (see 8 U. S. C. §§ 800–810), the possibility of such a distinction is not before us in the instant cases. The required finding by the Attorney General, after hearing, that any alien who is to be deported is an undesirable resident of the United States prevents the automatic deportation of anyone under this Act without such a hearing and finding.

[15] *Mahler* v. *Eby,* 264 U. S. 32; *Ng Fung Ho* v. *White,* 259 U. S. 276, 280; *Bugajewitz* v. *Adams,* 228 U. S. 585; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730.

ralization orders. A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized. The convictions of the relators for designated offenses are important conditions precedent to their being found to be undesirable residents. Their status as aliens is a necessary further condition of their deportability. When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied.

The statutory language which says that "aliens who since August 1, 1914, *have been or may hereafter be convicted* . . ." (emphasis supplied)[16] refers to the requirement that the deportations be applicable to all persons who had been convicted of certain enumerated offenses since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920. The crimes listed were not crimes in which convictions depended upon the citizenship, or lack of citizenship, of their perpetrators. In fact, they were crimes against the national security, so that their commission by naturalized citizens might well be regarded by Congress as more reprehensible than their commission by aliens who never had been naturalized.

The recognized purpose of the Act was deportation. It is difficult to imagine a reason which would have made it natural or appropriate for Congress to authorize the Attorney General to pass upon the undesirability and deportability of an alien, never naturalized, who had been convicted of espionage, but would prohibit the Attorney

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[16] See note 12, *supra*.

General from passing upon the undesirability and deportability of aliens, such as the relators in the instant cases, who had procured certificates of naturalization before their convictions of espionage, but later had been deprived of those certificates on the ground of fraud in their procurement. If there were to be a distinction made in favor of any aliens because they were at one time naturalized citizens, the logical time at which that status would be important would be the time of the *commission* of the crimes, rather than the purely fortuitous time of their *conviction* of those crimes. Not even such a distinction finds support in the statute.

The failure of Congress to give expression to the distinction, here urged by the relators, between aliens who never have been naturalized and those who have been denaturalized, was not due to unfamiliarity with such matters. In 1920, Congress must have been familiar with the status of aliens denaturalized under § 15 of the Act of June 29, 1906, 34 Stat. 601, see 8 U. S. C. § 736,[17] or expatriated under § 2 of the Citizenship Act of March 2, 1907, 34 Stat. 1228, see 8 U. S. C. § 801. It had had experience with the deportation of undesirable aliens under § 19 of the Immigration Act of February 5, 1917, 39 Stat. 889, see 8 U. S. C. § 155, as well as under other wartime Acts and Proclamations. These Acts did not distinguish between aliens who never had been naturalized, and those who had obtained naturalization by

[17] "The practice of filing proceedings to cancel certificates of naturalization became widespread immediately after The 1906 Act went into effect. In the fiscal year 1907 there were eighty-six certificates cancelled; in 1908 there were four hundred and fifty-seven; and in 1909, nine hundred and twenty-one. During the thirty years following the effective date of the 1906 Act, more than twelve thousand certificates of naturalization were cancelled on the ground of fraud or on the ground that the order and certificate of naturalization were illegally procured." Cable, Loss of Citizenship 4–5 (1943).

fraud only to lose it by court decree. If the Act of 1920 had been intended to initiate the distinction here urged by the relators, it is likely that the change would have been made by express provision for it. We find nothing in its legislative history that suggests a congressional intent to distinguish between two such groups of undesirable criminals.

The Congressional Committee Reports demonstrate that, while this statute was framed in general language and has remained in effect for 30 years, its enactment originally was occasioned by a desire to deport some or all of about 500 aliens who were then interned as dangerous enemy aliens and who might be found, after hearings, to be undesirable residents, and also to deport some or all of about 150 other aliens who, during World War I, had been convicted of violations of the Espionage Act or other national security measures, and who might be found, after hearings, to be undesirable residents.[18] It is hardly conceivable that, under those circumstances, Congress, without expressly saying so, intended to prevent the Secretary of Labor (or his successor, the Attorney General) from deporting alien offenders merely because they had received their respective convictions at times when they held certificates of naturalization, later canceled for fraud. To do so would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it.[19] Congress, in 1920, evidently wanted to provide a means by which to free the United States of residents who (1) had been or thereafter were convicted of certain offenses against the security of the United

[18] See H. R. Rep. No. 143 and S. Rep. No. 283, 66th Cong., 1st Sess.; 58 Cong. Rec. 3362–3376 (1919); *Ludecke* v. *Watkins*, 335 U. S. 160, 167–168, n. 12, 179–181.

[19] Compare the injunction included in the final decree of denaturalization quoted in note 8, *supra*.

States, (2) had been or thereafter were found, after hearing, to be undesirable residents of the United States, and (3) being aliens were subject to deportation. Congress said just that.

We have given consideration to such other points as were raised by the relators, but we find that they do not affect the result.[20]

The judgment of the Court of Appeals in each case is therefore

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK and MR. JUSTICE JACKSON join, dissenting.

In light of the attitude with which the doom of deportation has heretofore been viewed by this Court, in the case of those whose lives have been intimately tied to this country, I deem it my duty not to squeeze the Act of May 10, 1920, 41 Stat. 593, as amended, 8 U. S. C. § 157, so as to yield every possible hardship of which its words are susceptible. See *Ng Fung Ho* v. *White,* 259 U. S. 276, 284–85; *Delgadillo* v. *Carmichael,* 332 U. S. 388, 391; *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10; *Bridges* v. *Wixon,* 326 U. S. 135, 147; *Fiswick* v. *United States,* 329 U. S. 211, 222, n. 8; *Klapprott* v. *United States,* 335 U. S. 601, 612, modified, 336 U. S. 942. Because we have been mindful of the fact that such deportation may result "in loss of both property and life; or of all that makes life worth living," this Court concluded

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[20] Among these is the claim in the *Eichenlaub* case that the Act of 1920 does not apply to his conviction under the Espionage Act of 1917, because, in substance, the penalty for its violation had been increased in 1940. This contention is without merit.

that due process of law requires judicial determination when a claim of citizenship is made in a deportation proceeding, while upon entry or reentry the same claim may be determined administratively. It took into account the great difference "in security of judicial over administrative action." *Ng Fung Ho* v. *White, supra,* at 284, 285. I am aware of the fact that we are dealing here with a person whose citizenship has been taken from him. I maintain, however, that the rigorous statute permitting deportation of an "alien" should be read to apply only to one who was an alien when convicted and should not be made to apply to persons in the position of these petitioners.

Since such construction is not unreasonable, due regard for consequences demands that the statute be so read. Where, as here, a statute permits either of two constructions without violence to language, the construction which leads to hardship should be rejected in favor of the permissible construction consonant with humane considerations. The Act of May 10, 1920, provides that "All aliens who since August 1, 1914, have been or may hereafter be convicted" of certain offenses shall be deported upon a finding that they are "undesirable residents of the United States." Since neither of the petitioners herein was found to "have been" convicted of any offense before passage of the Act, they come, it is urged, within the alternative prerequisite. But the statute, in terms, refers to aliens "who . . . may hereafter be convicted," not persons who are citizens when convicted and later transformed into aliens by the process of denaturalization. And this view of the statute is reinforced by the legislative history as well as by considerations relating to the impact of the Court's decision upon various other congressional enactments not now before us.

The Committee reports[1] and congressional debate[2] make plain that Congress was principally concerned with the status of about 500 persons who had been interned by the President during the First World War as dangerous alien enemies and about 150 aliens who had been convicted under various so-called war statutes. Congress could not have been unaware that naturalized citizens may lose their citizenship; yet nowhere in the legislative history do we find the remotest hint that Congress had also such denaturalized citizens in mind. On the contrary, the debates contain ample evidence that Congress had in mind only persons convicted when aliens.[3]

The Court's decision has serious implications with respect to citizens denaturalized for reasons not involving moral blame,[4] and who have, while citizens, committed one of a variety of acts not involving moral obliquity and

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[1] H. R. Rep. No. 143, 66th Cong., 1st Sess. (1919); S. Rep. No. 283, 66th Cong., 1st Sess. (1919).

[2] 58 Cong. Rec. 3361–3377.

[3] Representative Gard: "I assume that everybody will agree with that, that if an alien is tried, is afforded a fair trial and is convicted, then he is a proper subject for deportation." 58 Cong. Rec. 3371.

Representative Robsion, discussing wealthy aliens: "We permitted them to live here and granted them practically all of the rights of the American citizen. They reward our hospitality by joining with our enemies in an effort to destroy us. As they were not citizens, they were not required to take up arms in defense of the country in which they had grown rich." 58 Cong. Rec. 3374.

[4] Citizenship is lost by any person "Voting in a political election in a foreign state." 8 U. S. C. § 801 (e). Bills are now before Congress to restore citizenship to the approximately 4,000 Americans who voted in recent Italian elections. See H. R. 6616 and 6617, 81st Cong., 2d Sess. (1950); H. R. Rep. No. 1469, 81st Cong., 2d Sess. (1950); 96 Cong. Rec. App. 117 (January 9, 1950). See also 8 U. S. C. §§ 801 (c) and (d), 804; *Battaglino* v. *Marshall*, 172 F. 2d 979. As to denaturalization based on fraud in the procurement of citizenship, see *Baumgartner* v. *United States*, 322 U. S. 665.

certainly not endangering the security of the country but which nevertheless are covered by other statutory provisions in language similar to that before us.[5] Thus, discriminations would as a matter of policy have to be drawn if this general problem were consciously faced by policy-makers. They are not within the power of this Court to draw. If and when Congress gives the matter

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[5] *E. g.*, 8 U. S. C. § 156a provides for the deportation of any alien, with exceptions not here pertinent, "who, after February 18, 1931, shall be convicted for violation of or conspiracy to violate" any federal or State narcotics law. In *United States* v. *Balint*, 258 U. S. 250, this Court held that conviction under the federal Anti-Narcotic Act can be had without the usual requirement of *scienter*.

Even convictions under laws related to the national security involve varying degrees of culpability. This is demonstrated by the remarks of the prosecuting attorney to the District Court concerning Dr. Willumeit, the relator in No. 82, when his sentence was being considered:

"It has been our belief, after having gone into this thing pretty thoroughly with him [the relator], that he was more or less caught in it without perhaps intending to go as far as the others went.

. . . . . .

". . . I have a feeling, your Honor, that Dr. Willumeit can be restored to decent citizenship in this country. I think he has something that he can give to America.

. . . . . .

". . . I would say that the Government would view a lenient sentence as a just sentence under all the circumstances. We think something can be done with this man. We do not think he is a bad man at heart, your Honor. We think he is probably a good man who got in with bad company and got in with this trouble.

. . . . . .

"I say to your Honor I am not his lawyer. I am supposed to be hard with him, I guess, if I believe in it. But in this case I do not feel that this man is a bad actor. I think there is a place for Dr. Willumeit in America in time, and he may become a most useful citizen."

thought, it may well draw distinctions between one who was an alien and one who was naturalized at the time of conviction, based on the manner in which citizenship was lost, the type of offense committed, and the lapse of time between conviction and denaturalization. These serious differentiations should not be disregarded by giving a ruthlessly undiscriminating construction to the statute before us not required by what Congress has written.

UNITED STATES EX REL. KNAUFF *v.* SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 54. Argued December 5–6, 1949.—Decided January 16, 1950.

The alien wife of a citizen who had served honorably in the armed forces of the United States during World War II sought admission to the United States. On the basis of confidential information the disclosure of which, in his judgment, would endanger the public security, the Attorney General denied a hearing, found that her admission would be prejudicial to the interests of the United States, and ordered her excluded. *Held:* This action was authorized by the Act of June 21, 1941, 22 U. S. C. § 223, and the proclamations and regulations issued thereunder, notwithstanding the War Brides Act of December 28, 1945, 8 U. S. C. § 232 *et seq.* Pp. 539–547.

(a) The admission of aliens to this country is not a right but a privilege, which is granted only upon such terms as the United States prescribes. P. 542.

(b) The Act of June 21, 1941, did not unconstitutionally delegate legislative power to prescribe the conditions under which aliens should be excluded. Pp. 542–543.

(c) It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. P. 543.

(d) Any procedure authorized by Congress for the exclusion of aliens is due process, so far as an alien denied entry is concerned. P. 544.

(e) The regulations governing the entry of aliens into the United States during the national emergency proclaimed May 27, 1941, which were prescribed by the Secretary of State and the Attorney General pursuant to Presidential Proclamation 2523, were "reasonable" within the meaning of the Act of June 21, 1941. P. 544.

(f) Presidential Proclamation 2523 authorized the Attorney General as well as the Secretary of State to order the exclusion of aliens. P. 544.

(g) Petitioner, an alien, had no vested right of entry which could be the subject of a prohibition against retroactive operation of regulations affecting her status. P. 544.

(h) The national emergency proclaimed May 27, 1941, has not been terminated; a state of war still exists; and the Act of June 21, 1941, and the proclamations and regulations thereunder are still in force. Pp. 545–546.

(i) A different result is not required by the War Brides Act, which waives some of the usual requirements for the admission of certain alien spouses only if they are "otherwise admissible under the immigration laws." Pp. 546–547.

173 F. 2d 599, affirmed.

The District Court dismissed a writ of habeas corpus obtained to test the right of the Attorney General to exclude from the United States, without a hearing, the alien wife of a citizen who had served honorably in the armed forces of the United States during World War II. The Court of Appeals affirmed. 173 F. 2d 599. This Court granted certiorari. 336 U. S. 966. *Affirmed,* p. 547.

Gunther Jacobson argued the cause and filed a brief for petitioner.

Philip R. Monahan argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Joseph W. Bishop, Jr.* and *Robert S. Erdahl.*

Jack Wasserman filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE MINTON delivered the opinion of the Court.

May the United States exclude without hearing, solely upon a finding by the Attorney General that her admission would be prejudicial to the interests of the United States, the alien wife of a citizen who had served honorably in the armed forces of the United States during World War II? The District Court for the Southern District of New York held that it could, and the Court of Appeals for the Second Circuit affirmed. 173 F. 2d 599. We granted certiorari to examine the question especially in the light of the War Brides Act of December 28, 1945. 336 U. S. 966.

Petitioner was born in Germany in 1915. She left Germany and went to Czechoslovakia during the Hitler regime. There she was married and divorced. She went to England in 1939 as a refugee. Thereafter she served with the Royal Air Force efficiently and honorably from January 1, 1943, until May 30, 1946. She then secured civilian employment with the War Department of the United States in Germany. Her work was rated "very good" and "excellent." On February 28, 1948, with the permission of the Commanding General at Frankfurt, Germany, she married Kurt W. Knauff, a naturalized citizen of the United States. He is an honorably discharged United States Army veteran of World War II. He is, as he was at the time of his marriage, a civilian employee of the United States Army at Frankfurt, Germany.

On August 14, 1948, petitioner sought to enter the United States to be naturalized. On that day she was temporarily excluded from the United States and detained at Ellis Island. On October 6, 1948, the Assistant Commissioner of Immigration and Naturalization recommended that she be permanently excluded without a hearing on the ground that her admission would be

prejudicial to the interests of the United States. On the same day the Attorney General adopted this recommendation and entered a final order of exclusion. To test the right of the Attorney General to exclude her without a hearing for security reasons, *habeas corpus* proceedings were instituted in the Southern District of New York, based primarily on provisions of the War Brides Act. The District Court dismissed the writ, and the Court of Appeals affirmed.

The authority of the Attorney General to order the exclusion of aliens without a hearing flows from the Act of June 21, 1941, amending § 1 of the Act of May 22, 1918 (55 Stat. 252, 22 U. S. C. § 223).[1] By the 1941 amendment it was provided that the President might, upon finding that the interests of the United States required it, impose additional restrictions and prohibitions on the entry into and departure of persons from the United States during the national emergency proclaimed May 27, 1941. Pursuant to this Act of Congress the President on November 14, 1941, issued Proclamation 2523 (3 CFR, 1943 Cum. Supp., 270–272). This proclamation recited that the interests of the United States required the imposition of additional restrictions upon the entry into and

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[1] "When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe . . . ."

departure of persons from the country and authorized the promulgation of regulations jointly by the Secretary of State and the Attorney General. It was also provided that no alien should be permitted to enter the United States if it were found that such entry would be prejudicial to the interests of the United States.[2]

Pursuant to the authority of this proclamation the Secretary of State and the Attorney General issued regulations governing the entry into and departure of persons from the United States during the national emergency. Subparagraphs (a) to (k) of § 175.53 of these regulations specified the classes of aliens whose entry into the United States was deemed prejudicial to the public interest. Subparagraph (b) of § 175.57 provided that the Attorney General might deny an alien a hearing before a board of inquiry in special cases where he determined that the alien was excludable under the regulations on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.[3]

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[2] "(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

"No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General." 3 CFR, 1943 Cum. Supp., 271.

[3] "In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be, excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after

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It was under this regulation § 175.57 (b) that petitioner was excluded by the Attorney General and denied a hearing. We are asked to pass upon the validity of this action.

At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides. *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711.

Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

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the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." 8 CFR, 1945 Supp., § 175.57 (b).

Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659–660; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713–714; *Ludecke* v. *Watkins,* 335 U. S. 160. Cf. *Yamataya* v. *Fisher,* 189 U. S. 86, 101. Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e. g.,* as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent. What was said in *Lichter* v. *United States,* 334 U. S. 742, 785, is equally appropriate here:

> "It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. . . . Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.' "

Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. *Nishimura Ekiu* v. *United States, supra; Ludecke* v. *Watkins, supra.*

In the particular circumstances of the instant case the Attorney General, exercising the discretion entrusted to him by Congress and the President, concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States. He denied her a hearing on the matter because, in his judgment, the disclosure of the information on which he based that opinion would itself endanger the public security.

We find no substantial merit to petitioner's contention that the regulations were not "reasonable" as they were required to be by the 1941 Act. We think them reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II. Nor can we agree with petitioner's assertion that Proclamation 2523 (see note 2, *supra*) authorized only the Secretary of State, and not the Attorney General, to order the exclusion of aliens. See Presidential Proclamation 2850 of August 17, 1949 (14 Fed. Reg. 5173), amending and clarifying Proclamation 2523. We reiterate that we are dealing here with a matter of *privilege.* Petitioner had no vested *right* of entry which could be the subject of a prohibition against retroactive operation of regulations affecting her status.

It is not disputed that the Attorney General's action was pursuant to the 8 CFR regulations heretofore discussed.[4] However, 22 U. S. C. § 223,[5] authorizes these special restrictions on the entry of aliens only when the United States is at war or during the existence of the

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[4] See note 3, *supra.*

[5] See note 1, *supra.*

national emergency proclaimed May 27, 1941.[6] For ordinary times Congress has provided aliens with a hearing. 8 U. S. C. §§ 152, 153. And the contention of petitioner is that she is entitled to the statutory hearing because for purposes of the War Brides Act, within which she comes, the war terminated when the President proclaimed the cessation of hostilities.[7] She contends that the War Brides Act, applicable portions of which are set out in the margin,[8] discloses a congressional intent that special restrictions on the entry of aliens should cease to apply to war brides upon the cessation of hostilities.

The War Brides Act provides that World War II is the period from December 7, 1941, until the proclaimed termination of hostilities. This has nothing to do with the period for which the regulations here acted under were

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[6] And at certain other times not material here.

[7] Proclamation 2714 of December 31, 1946, 3 CFR, 1946 Supp., 77.

[8] "That notwithstanding any of the several clauses of section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States . . . .

"SEC. 2. Regardless of section 9 of the Immigration Act of 1924, any alien admitted under section 1 of this Act shall be deemed to be a nonquota immigrant as defined in section 4 (a) of the Immigration Act of 1924.

. . . . . .

"SEC. 5. For the purpose of this Act, the Second World War shall be deemed to have commenced on December 7, 1941, and to have ceased upon the termination of hostilities as declared by the President or by a joint resolution of Congress." 59 Stat. 659, 8 U. S. C. §§ 232–236.

authorized. The beginning and end of the war are defined by the War Brides Act, we assume, for the purpose of ascertaining the period within which citizens must have served in the armed forces in order for their spouses and children to be entitled to the benefits of the Act. The special procedure followed in this case was authorized not only during the period of actual hostilities but during the entire war and the national emergency proclaimed May 27, 1941. The national emergency has never been terminated. Indeed, a state of war still exists. See *Woods* v. *Miller Co.*, 333 U. S. 138, n. 3. Thus, the authority upon which the Attorney General acted remains in force. The Act of June 21, 1941, and the President's proclamations and the regulations thereunder are still a part of the immigration laws.

The War Brides Act does not relieve petitioner of her alien status. Indeed, she sought admission in order to be naturalized and thus to overcome her alien status. The Act relieved her of certain physical, mental, and documentary requirements and of the quota provisions of the immigration laws. But she must, as the Act requires, still be "otherwise admissible under the immigration laws." In other words, aside from the enumerated relaxations of the immigration laws she must be treated as any other alien seeking admission. Under the immigration laws and regulations applicable to all aliens seeking entry into the United States during the national emergency, she was excluded by the Attorney General without a hearing. In such a case we have no authority to retry the determination of the Attorney General. *Ludecke* v. *Watkins*, 335 U. S. 160, 171–172.

There is nothing in the War Brides Act or its legislative history [9] to indicate that it was the purpose of Congress,

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[9] See H. R. Rep. No. 1320, 79th Cong., 1st Sess. (1945); S. Rep. No. 860, 79th Cong., 1st Sess. (1945); 91 Cong. Rec. 11738, 12342 (1945).

by partially suspending compliance with certain requirements and the quota provisions of the immigration laws, to relax the security provisions of the immigration laws. There is no indication that Congress intended to permit members or former members of the armed forces to marry and bring into the United States aliens that the President, acting through the Attorney General in the performance of his sworn duty, found should be denied entry for security reasons. As all other aliens, petitioner had to stand the test of security. This she failed to meet. We find no legal defect in the manner of petitioner's exclusion, and the judgment is

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

If the essence of statutory construction is to find the thought beneath the words, the views expressed by MR. JUSTICE JACKSON, in which I fully concur, enforce the purpose of Congress. The contrary conclusion substantially frustrates it.

Seventy years ago began the policy of excluding mentally defective aliens from admission into the United States. Thirty years ago it became our settled policy to admit even the most desirable aliens only in accordance with the quota system. By the so-called War Brides Act Congress made inroads upon both these deeply-rooted policies. (Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. § 232 *et seq.*) It lifted the bar against the exclusion even of "physically and mentally defective aliens." It did this in favor of "alien spouses and alien minor children of citizen members who are serving or have served honorably in the armed forces of the United States during World War II." H. R. Rep. No. 1320 and S. Rep. No. 860, 79th Cong., 1st Sess. (1945).

This was a bounty afforded by Congress not to the alien who had become the wife of an American but to the citizen who had honorably served his country. Congress gave this bounty even though a physically or mentally defective person might thereby be added to the population of the United States. Yet it is suggested that the deepest tie that an American soldier could form may be secretly severed on the mere say-so of an official, however well-intentioned. Although five minutes of cross-examination could enable the soldier-husband to dissipate seemingly convincing information affecting the security danger of his wife, that opportunity need not be accorded. And all this, because of the literal reading of the provision of the War Brides Act that the alien spouse, though physically and mentally defective, is to be allowed to join her citizen husband "if otherwise admissible under the immigration laws." Upon that phrase is rested the whole structure of Executive regulation based on § 1 of the Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, 22 U. S. C. § 223, regarding the summary exclusion, without opportunity for a hearing, of an alien whose entry the Attorney General finds inimical to the public interest.*

This is not the way to read such legislation. It is true also of Acts of Congress that "The letter killeth." Legislation should not be read in such a decimating spirit unless the letter of Congress is inexorable. We are reminded from time to time that in enacting legislation Congress is not engaged in a scientific process which takes account of every contingency. Its laws are not to be read as though every *i* has to be dotted and every *t*

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*The Attorney General is to act on information that satisfies him; not only is there no opportunity for a hearing, but the Attorney General can lock in his own bosom the evidence that does satisfy him. 8 C. F. R. §§ 175.53, 175.57 (1949).

crossed. The War Brides Act is legislation derived from the dominant regard which American society places upon the family. It is not to be assumed that Congress gave with a bountiful hand but allowed its bounty arbitrarily to be taken away. In framing and passing the War Brides Act, Congress was preoccupied with opening the door to wives acquired by American husbands during service in foreign lands. It opened the door on essentials—wives of American soldiers and perchance mothers of their children were not to run the gauntlet of administrative discretion in determining their physical and mental condition, and were to be deemed nonquota immigrants. Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera.* Compare Rule 46 of the Rules of Practice for Admiralty Courts during World War II, 316 U. S. 717; 328 U. S. 882, and see Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements,* 61 Harv. L. Rev. 468, 482–83 (1948). An alien's opportunity of entry into the United States is of course a privilege which Congress may grant or withhold. But the crux of the problem before us is whether Congress, having extended the privilege for the benefit not of the alien but of her American husband, left wide open the opportunity ruthlessly to take away what it gave.

A regulation permitting such exclusion by the Attorney General's fiat—in the nature of things that high functionary must largely act on dossiers prepared by others—in the case of an alien claiming entry on his own account is one thing. To construe such regulation to be authorized and to apply in the case of the wife of an honorably

discharged American soldier is quite another thing. Had Congress spoken explicitly we would have to bow to it. Such a substantial contradiction of the congressional beneficence which is at the heart of the War Brides Act ought not to be attributed to Congress by a process of elaborate implication. Especially is this to be avoided when to do so charges Congress with an obviously harsh purpose. Due regard for the whole body of immigration laws and policies makes it singularly appropriate in construing the War Brides Act to be heedful of the admonition that "The letter killeth."

MR. JUSTICE JACKSON, whom MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER join, dissenting.

I do not question the constitutional power of Congress to authorize immigration authorities to turn back from our gates any alien or class of aliens. But I do not find that Congress has authorized an abrupt and brutal exclusion of the wife of an American citizen without a hearing.

Congress held out a promise of liberalized admission to alien brides, taken unto themselves by men serving in or honorably discharged from our armed services abroad, as the Act, set forth in the Court's opinion, indicates. The petitioning husband is honorably discharged and remained in Germany as a civilian employee. Our military authorities abroad required their permission before marriage. The Army in Germany is not without a vigilant and security-conscious intelligence service. This woman was employed by our European Command and her record is not only without blemish, but is highly praised by her superiors. The marriage of this alien woman to this veteran was approved by the Commanding General at Frankfurt-on-Main.

Now this American citizen is told he cannot bring his wife to the United States, but he will not be told why.

He must abandon his bride to live in his own country or forsake his country to live with his bride.

So he went to court and sought a writ of *habeas corpus,* which we never tire of citing to Europe as the unanswerable evidence that our free country permits no arbitrary official detention. And the Government tells the Court that not even a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and, even if we cannot get any reasons for it, we must say it is legal; security requires it.

Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. *Cf. In re Oliver,* 333 U. S. 257, 268.

I am sure the officials here have acted from a sense of duty, with full belief in their lawful power, and no doubt upon information which, if it stood the test of trial, would justify the order of exclusion. But not even they know whether it would stand this test. And anyway, as I have said before, personal confidence in the officials involved does not excuse a judge for sanctioning a procedure that is dangerously wrong in principle. Dissent in *Bowles* v. *United States,* 319 U. S. 33, 37.

Congress will have to use more explicit language than any yet cited before I will agree that it has authorized an administrative officer to break up the family of an

American citizen or force him to keep his wife by becoming an exile. Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it.

I should direct the Attorney General either to produce his evidence justifying exclusion or to admit Mrs. Knauff to the country.

BRYAN *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 178. Argued December 13–14, 1949.—Decided January 16, 1950.

1. When a United States Court of Appeals reverses a District Court in a criminal case because the evidence is not sufficient to sustain a conviction, and the defendant had made all proper and timely motions for acquittal and for a new trial in the District Court, the Court of Appeals is not required to direct a judgment of acquittal but may direct a new trial. Pp. 553–560.

   (a) The authority to remand a cause and direct the entry of an "appropriate judgment" has long been exercised by federal appellate courts and is now vested in the Court of Appeals by 28 U. S. C. § 2106. Pp. 554–558.

   (b) A different result is not required by Rule 29 of the Federal Rules of Criminal Procedure, since that Rule refers to proceedings in the District Court and does not control the directions which a Court of Appeals may issue when it remands a cause to a District Court. Pp. 558–559.

   (c) On the record in this case, the direction of a new trial by the Court of Appeals was an "appropriate" judgment which was "just" under the circumstances, within the meaning of 28 U. S. C. § 2106. Pp. 559–560.

2. Where an accused successfully seeks review of a conviction, having assigned several errors on appeal, including denial of a motion for acquittal, there is no double jeopardy upon a new trial. P. 560.

175 F. 2d 223, affirmed.

Petitioner was convicted of an attempt to evade the income-tax laws, and the District Court denied motions for the entry of a judgment of acquittal and for a new trial. The Court of Appeals reversed, because the evidence was insufficient to sustain the verdict, and remanded the cause to the District Court with directions to grant a new trial. 175 F. 2d 223. This Court granted certiorari. 338 U. S. 813. *Affirmed,* p. 560.

Carl J. Batter argued the cause for petitioner. With him on the brief was *Alston Cockrell.*

Melva M. Graney argued the cause for the United States. With her on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney, Ellis N. Slack* and *Fred G. Folsom.*

Mr. Justice Minton delivered the opinion of the Court.

The important question presented upon this record is whether the Court of Appeals, when it reverses the District Court because the evidence is not sufficient to sustain a conviction, may direct a new trial where a defendant had made all proper and timely motions for acquittal in the District Court.

Petitioner was convicted upon two counts of an attempt to evade the income-tax laws and sentenced to two years' imprisonment on one count and to pay a fine of ten thousand dollars on the other. At the close of the Government's case petitioner moved for a judgment of acquittal, and the motion was renewed at the conclusion of all the evidence. A verdict of guilty was returned, and within five days petitioner made a further motion for judgment of acquittal or in the alternative for a new trial. These motions were all denied. On appeal to the Court of Appeals, the judgment was reversed because the evidence was insufficient to sustain the verdict. 175

F. 2d 223. The Court of Appeals remanded with directions to the District Court to grant a new trial. Petitioner moved the Court of Appeals to amend the judgment to "conform to Rule 29 (a) of Federal Rules of Criminal Procedure," alleging that a judgment of acquittal should have been entered. This motion was denied.

We granted certiorari to examine the power of the Court of Appeals to grant a new trial under the circumstances of this case. 338 U. S. 813.

The extent of the power of federal appellate courts to enter judgment when reversing and remanding cases arising in the lower federal courts has been defined by statutes from the inception of our system of courts. By the Judiciary Act of September 24, 1789, 1 Stat. 85, the Supreme Court was given statutory authority, upon review of a District Court judgment, to order such further proceedings "as the district court should have rendered or passed." See *Ballew* v. *United States,* 160 U. S. 187, 198–99. In 1872 power was given this Court to "direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require." 17 Stat. 196–97. Our authority to render judgment "as the justice of the case may require" was continued in those terms until the revision of the Judicial Code in 1948. R. S. § 701, Old Title 28 U. S. C. § 876. This authority was exercised by remanding for a new trial where, on writ of error to a District Court, the judgment was reversed on the ground that the evidence was not sufficient to sustain the verdict. *Wiborg* v. *United States,* 163 U. S. 632. Likewise in *Clyatt* v. *United States,* 197 U. S. 207, on writ of certiorari to the Court of Appeals for the Fifth Circuit, a new trial was directed where the evidence was held to be insufficient to sustain the conviction. On a similar ground this Court reversed a judg-

ment and directed that the defendants be discharged. *France* v. *United States,* 164 U. S. 676.

The authority and practice of the Courts of Appeals have been roughly parallel to those of this Court. When the Circuit Courts of Appeals were established in 1891, it was provided that upon reversal by such courts the "cause shall be remanded to the . . . district court for further proceedings to be there taken in pursuance of such determination." 26 Stat. 829, 28 U. S. C. § 877.[1] Under this provision the Circuit Courts of Appeals have reversed for insufficiency of the evidence to sustain the verdict and remanded for a new trial in numerous cases, although a verdict should have been directed for the defendant by the District Court. First Circuit: *Enrique Rivera* v. *United States,* 57 F. 2d 816; Third Circuit: *United States* v. *Di Genova,* 134 F. 2d 466; *United States* v. *Russo,* 123 F. 2d 420; *Ridenour* v. *United States,* 14 F. 2d 888; Eighth Circuit: *Pines* v. *United States,* 123 F. 2d 825; *Scoggins* v. *United States,* 255 F. 825; Ninth Circuit: *Buhler* v. *United States,* 33 F. 2d 382; Tenth Circuit: *Leslie* v. *United States,* 43 F. 2d 288. Under the same

[1] The succeeding section provided that existing methods of review should regulate the system of appeals and writs of error in the Circuit Courts of Appeals and that the judges of the new courts were to have "the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States . . . ." 26 Stat. 829. Although in terms this latter section dealt only with the conditions under which appeals or writs of error would be permitted, it was construed by some courts as making 28 U. S. C. § 876, relating to the appellate power of the Supreme Court, applicable to the Circuit Courts of Appeals. *Farrar* v. *Wheeler,* 145 F. 482, 486–87; *Whitworth* v. *United States,* 114 F. 302, 305; *Standard Co.* v. *Crane Elevator Co.,* 76 F. 767, 775. Cf. *Realty Corp.* v. *Montgomery,* 284 U. S. 547, 550; *Ballew* v. *United States,* 160 U. S. 187, 201–202; *Equitable Life Assur. Soc.* v. *Mercantile Co.,* 143 F. 2d 397, 405; *United States* v. *Illinois Surety Co.,* 226 F. 653, 664.

statutory authority[2] several Circuit Courts of Appeals have directed the discharge of the defendant or the dismissal of the indictment when reversing for insufficiency of the evidence. Second Circuit: *United States* v. *Bonanzi,* 94 F. 2d 570; *Romano* v. *United States,* 9 F. 2d 522; Sixth Circuit: *Cemonte* v. *United States,* 89 F. 2d 362; Ninth Circuit: *Klee* v. *United States,* 53 F. 2d 58. Since the Federal Rules of Criminal Procedure went into effect on March 21, 1946, three Circuit Courts of Appeals have entered a judgment of acquittal upon reversing for insufficiency of the evidence, relying at least in part on Rule 29.[3] Third Circuit: *United States* v. *Bozza,* 155 F.

[2] Section 877 authorized the Supreme Court on direct appeal or otherwise from the District Court to order the cause remanded to the proper District Court for "further proceedings to be taken in pursuance of such determination." On appeal or otherwise to the Supreme Court from the Circuit Courts of Appeals, after review and determination, the cause "shall be remanded by the Supreme Court to the proper district court for further proceedings in pursuance of such determination." On appeal or otherwise in a cause coming to the Circuit Court of Appeals from the District Court for review and determination, in which the decision of the Circuit Court of Appeals is final, "such cause shall be remanded to the said district court for further proceedings to be there taken in pursuance of such determination." It may be noted that the language giving authority to the Supreme Court to remand a proceeding brought to the Court from the Circuit Court of Appeals did not contain the words "to be taken" as in the case of the direct proceedings from the District Court. In proceedings from the District Court to the Circuit Court of Appeals, the language was still different. There the remand was "for further proceedings to be there taken in pursuance of such determination." We have found no case which has noticed this discrepant language, although in the same section.

[3] "Rule 29. Motion for Acquittal.

"(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient

2d 592; *United States* v. *Renee Ice Cream Co.*, 160 F. 2d 353; Seventh Circuit: *United States* v. *Gardner*, 171 F. 2d 753; Ninth Circuit: *Karn* v. *United States*, 158 F. 2d 568.[4]

When the Judicial Code was revised in 1948 the provisions of § 876 and § 877 relating to the power of this Court and that of the Courts of Appeals on remand were dovetailed into a single section, 28 U. S. C. § 2106,[5] providing:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

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to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

"(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal." 327 U. S. 853.

[4] In the instant case the Court of Appeals for the Fifth Circuit discussed but did not decide the applicability of Rule 29 to its judgments. The court was of the opinion that if the Rule applied it authorized the court's direction of a new trial.

[5] 28 U. S. C. § 344, relevant to review of cases from state courts by the Supreme Court, was also incorporated in § 2106.

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Under this statute for the first time the power of the Supreme Court and the Courts of Appeals to enter judgment when remanding a case to the lower court is set out in identical language in a single section. That coextensive power is to direct "such appropriate judgment . . . as may be just under the circumstances." This language is at least as broad as the provisions of § 876 and § 877. As detailed above, this Court and the Courts of Appeals directed new trials as a matter of course under those sections.

It is petitioner's position that this previous authority has been abrogated by the advent of the Federal Rules of Criminal Procedure, especially Rule 29 (a) and (b).[6] Petitioner argues that the Court of Appeals must give the judgment that the trial court would have been required to award had it ruled correctly. Since the Government failed to make out a *prima facie* case, he claims that he is entitled to a judgment of acquittal because the trial court is required by Rule 29 to enter such judgment on proper motion where it finds the evidence insufficient to sustain a verdict. Petitioner contends in the alternative that Rule 29 applies to the Courts of Appeals, and that the Court of Appeals was itself compelled by the Rule to give a judgment of acquittal when it decided that the evidence was insufficient to sustain the conviction.

The Rules are entitled "Rules of Criminal Procedure for the United States District Courts." Rule 1 defines their scope, stating that "These rules govern the procedure in the courts of the United States." The Courts of Appeals are included in the list of courts specified in Rule 54 (a) (1) to which the Rules are to apply. It is obvious, nevertheless, that some of the rules are relevant only to preliminary proceedings or to procedure

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[6] See note 3, *supra*.

prior to appeal. In our opinion Rule 29 is such a Rule, referring solely to the conduct of trials in the District Courts. It is there that the motion for judgment of acquittal is made. It is the office of the trial court to rule on the motion. We hold that the "court" referred to in Rule 29 is the District Court. Consequently the Rule does not affect, either to add to or to detract from, the power of Courts of Appeals when remanding a case to the District Court.

Of course the Court of Appeals must determine whether the Rule has been observed by the District Court. If it finds that the District Court has erred and has not properly applied the Rule, that is an error of law for which the Court of Appeals may reverse and remand. But when the Court of Appeals remands, Rule 29 does not control its directions to the District Court. The Court of Appeals must look to the statute defining its appellate power, 28 U. S. C. § 2106, for guidance as to the kind of order which it may direct the District Court to enter.

We thus reach the question of whether the direction of a new trial by the Court of Appeals was an "appropriate" judgment which was "just" under the circumstances and therefore authorized by § 2106, or whether, as petitioner contends, it was mandatory that the Court of Appeals enter a judgment of acquittal. Whether the direction of a judgment of acquittal or a remand to the District Court without direction by the Court of Appeals would meet those requirements is not before us.

As previously stated, the Courts of Appeals had often directed a new trial prior to the enactment of § 2106. The Court of Appeals apparently believed that justice was served by the granting of a new trial in this case. On the motion to amend its order of remand the court stated: "The majority thinking the defect in the evidence might be supplied on another trial directed that it be had." And one judge vigorously dissented from the original

opinion because he thought that the evidence amply supported the verdict.

A new trial was one of the remedies which petitioner sought. He properly gave the District Court an opportunity after verdict to correct its error in failing to sustain his motion for judgment of acquittal at the conclusion of all the evidence, which claimed error was assigned as a ground for a new trial. We agree that on this record the order for a new trial was a just and appropriate judgment which the Court of Appeals was authorized to enter by 28 U. S. C. § 2106.

Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. ". . . where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." *Francis* v. *Resweber,* 329 U. S. 459, 462. See *Trono* v. *United States,* 199 U. S. 521, 533–34.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACK and MR. JUSTICE REED would affirm with a modification of the judgment to remand to the District Court to decide whether a judgment of acquittal should be entered or a new trial ordered. In their opinion 28 U. S. C. § 2106 means that the order of an appellate court should be conformable to specific legal limitations. In this case such a limitation is found in Criminal Rule 29. Under that rule the determination as to whether to grant a new trial or to acquit rests with the District Court. See *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 212.

MANNING, COLLECTOR OF INTERNAL REVENUE, v. SEELEY TUBE & BOX CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 70. Argued November 17–18, 1949.—Decided February 6, 1950.

Respondent corporation filed a federal tax return for 1941 and timely paid the amount of the tax shown thereon. In 1943, after respondent had been adjudged a bankrupt, the Commissioner of Internal Revenue, using the accelerated procedure applicable in bankruptcy cases, assessed a deficiency in the 1941 tax with interest from the date the tax was properly due to the assessment date. Respondent subsequently filed its return for 1943, which disclosed a net operating loss for that year. Under the carry-back provision of the Internal Revenue Code, this loss was sufficient to abate completely respondent's tax liability for 1941. *Held:* Respondent was not entitled to a refund of the interest which had been assessed on the tax deficiency. Pp. 562–571.

(a) The subsequent cancellation of the assessed deficiency by operation of the carry-back provision did not cancel respondent's obligation to pay the interest assessed on the deficiency. Pp. 565–566.

(b) Enactment of the carry-back provision in 1942 did not change the basic statutory policy that the United States is to have the possession and use of the lawful tax at the date it is properly due. Pp. 566–567.

(c) The conclusion that the carry-back provision does not retroactively alter the duty of the taxpayer to pay his full tax promptly is supported by § 3771 (e) of the Code, which prohibits a taxpayer who does pay a tax which is subsequently abated by a carry-back from claiming interest from the Government for the intervening period. Pp. 567–568.

(d) Where a deficiency and interest have been validly assessed under any applicable statutory procedure, a subsequent carry-back with an abatement of the deficiency does not abate the interest previously assessed on that deficiency. Pp. 569–570.

172 F. 2d 77, reversed.

In an action against the Collector of Internal Revenue to recover an amount withheld as interest on a tax defi-

ciency which was subsequently abated, the District Court gave judgment for the Collector. 76 F. Supp. 937. The Court of Appeals reversed. 172 F. 2d 77. This Court granted certiorari. 337 U. S. 955. *Reversed,* p. 571.

Solicitor General Perlman argued the cause for petitioner. With him on the brief were *Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *I. Henry Kutz.*

Walter J. Bilder and *George G. Tyler* argued the cause for respondent. With them on the brief were *Nathan Bilder* and *William J. Nolan, Jr.*

Gorden F. DeFosset filed a brief, as *amicus curiae,* supporting petitioner.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The facts of this case have been agreed upon by stipulation. On December 15, 1941, respondent taxpayer, a New Jersey corporation, filed a corporate tax return for its fiscal period, January 1, 1941, to September 30, 1941. On January 12, 1942, the Commissioner of Internal Revenue assessed the tax,[1] which respondent timely paid. Respondent was adjudged a bankrupt and a receiver was appointed on July 7, 1943. On August 2, 1943, the Commissioner, using the accelerated procedure applicable in bankruptcy cases,[2] assessed deficiencies in the 1941

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[1] The payment in question included corporate income tax, defense tax and excess profits tax. No question is presented as to the correctness of the defense tax payment.

[2] Int. Rev. Code § 274 (a): "Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law)

taxes with interest from the date the tax was properly due to the assessment date.[3]

On March 3, 1944, respondent filed its return for the fiscal period from October 1, 1942, to September 30,

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determined by the Commissioner in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy or the appointment of the receiver."

[3] Deficiencies were assessed both as to the normal income tax and as to the excess profits tax.

Further deficiencies were assessed March 21, 1944. The interest on these deficiencies amounted to $82.66, whereas the interest on the deficiencies assessed in August, 1943, totaled $4,430.68. We feel that any possible difference in result attributable to the timing of the assessment has little effect on the amount to which taxpayer might be entitled in this case, and we do not consider this factor.

The record is bare of any claim or payment of interest from the date of the assessment of the deficiency until the date of the claim of the refund. See Int. Rev. Code § 294 (b).

Respondent does not urge and we need not decide the applicability of *City of New York* v. *Saper*, 336 U. S. 328 (1949), where we held that under the circumstances of that case, bankruptcy terminated the running of interest on claims against the bankrupt. In view of the facts that respondent was revested with title to its assets on June

1943, showing a net operating loss [4] for that year. This loss, when carried back in accordance with § 122 (b) (1) of the Internal Revenue Code,[5] was sufficient to abate completely respondent's tax liability for 1941. Respondent then filed claims for a refund of that part of the 1941 tax which had already been paid, and for the abatement of the assessed deficiency and interest. The Commissioner abated the deficiency, but refused to refund all the tax which had been paid, retaining an amount equal to the interest which had been assessed on the deficiency.

Respondent then sued the Collector for the interest. The District Court sustained the Collector, holding that the payment of the interest remained an obligation of the taxpayer, even though the assessed deficiency had itself been abated. 76 F. Supp. 937 (1948). The Court of Appeals reversed, holding that the carry-back, in wiping out the debt of the tax deficiency, must also have wiped out the interest which had been assessed on that deficiency. 172 F. 2d 77 (1948). Because of the frequency of the use of the carry-back provision of the

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4, 1945, and that the period between the bankruptcy and the major part of the assessment was less than a month, we do not feel that the holding of that case could effect any significant change in the disposition of the problem at hand.

[4] Int. Rev. Code § 122 (a): "As used in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d)."

[5] Int. Rev. Code § 122 (b) (1): "If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, ..."

The carry-back operated similarly on the excess profits tax. 26 U. S. C. §§ 710, 728, 729 (1946). The entire excess profits section of the Code, passed in 1940, 54 Stat. 975, was repealed in 1945, 59 Stat. 568.

Internal Revenue Code, we granted certiorari. 337 U. S. 955 (1949).

The general statutory scheme which presents the problem is as follows: As of a certain date the taxpayer has a duty to file a return for the previous fiscal year and pay the amount of the tax actually due for that year.[6] If this return is erroneously calculated and the payment is less than the tax properly due, the Commissioner, using the procedure appropriate to the particular situation, may assess a deficiency, the difference between the tax imposed by law and the tax shown upon the return.[7] Interest upon this deficiency at the rate of six per cent from the date the tax was lawfully due to the date of the assessment is assessed at the same time as the deficiency.[8] If a net operating loss is subsequently sustained, that loss may be carried back and added to the deductions for the two previous taxable years, with appropriate adjustments in the tax liability for those years. The problem with which we are concerned in this case is whether the interest on a validly assessed deficiency is abated when the deficiency itself is abated by the carry-back of a net operating loss.

We hold that the interest was properly withheld by the Collector. The subsequent cancellation of the duty to pay this assessed deficiency does not cancel in like manner the duty to pay the interest on that deficiency. From the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax. See *Rodgers* v. *United States,* 332 U. S. 371, 374 (1947); *United States* v. *Childs,* 266 U. S. 304,

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[6] See Int. Rev. Code §§ 52 (a), 53 (a), 56 (a). The tax may also be paid in quarterly installments. Int. Rev. Code § 56 (b).

[7] Int. Rev. Code § 271 (a).

[8] Int. Rev. Code § 292 (a).

309–310 (1924); *Billings* v. *United States*, 232 U. S. 261, 285–287 (1914). For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period. In the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government.

It is apparent from an inspection of the Code that Congress intended the United States to have the use of the money lawfully due when it became due. Several sections of the Code prescribe penalties and additions to the tax for negligence and fraud.[9] A taxpayer who files a timely return but does not pay the tax on time must pay interest on the tax until payment.[10] Even when the Commissioner, at the request of the taxpayer, authorizes an extension of the time of payment, interest must be paid by the taxpayer for the period of the extension.[11] And when the Commissioner assesses a deficiency he also may assess interest on that deficiency from the date the tax was due to the assessment date.[12]

The enactment of the carry-back provision in 1942 did not change this policy of the statute requiring prompt payment. This section was intended to afford taxpayers an opportunity to present for tax purposes a realistic, balanced picture of their profits and losses. It permits a taxpayer to add a net operating loss for one year to

[9] *E. g.*, Int. Rev. Code §§ 291 (a), 293 (a), (b).

[10] Int. Rev. Code § 294 (a) (1).

[11] Int. Rev. Code §§ 56 (c) (1), 295.

[12] Int. Rev. Code § 292 (a).

the deductions for the two previous taxable years. The Report of the Senate Committee on Finance states that the purpose of the section was to afford relief to cases where maintenance and upkeep expenses were deferred to peacetime years because of wartime restrictions. S. Rep. No. 1631, 77th Cong., 2d Sess. 51–52 (1942). But there is no indication that Congress intended to encourage taxpayers to cease prompt payment of taxes. The same Report, explaining the operation of the section which became the present carry-back provision, states, "A taxpayer entitled to a carry-back of a net operating loss or an unused excess profits credit . . . will not be able to determine the deduction on account of such carry-back until the close of the future taxable year in which he sustains the net operating loss or has the unused excess profits credit. *He must therefore file his return and pay his tax without regard to such deduction,* and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back." S. Rep. No. 1631 at 123–124. (Italics added.) We can imagine no clearer indication of a congressional understanding and intent that the carry-back was not to be interpreted as deferring or delaying the prompt payment of taxes properly due.

Although it is true that for many purposes the carry-back is equivalent to a *de novo* determination of the tax, our conclusion that this section does not retroactively alter the duty of a taxpayer to pay his full tax promptly is amply supported by § 3771 (e) of the Code.[13]

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[13] Int. Rev. Code § 3771 (e): "If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits

That section, an integral part of the carry-back provision, prohibits a taxpayer who does pay a tax which is subsequently abated by a carry-back from claiming interest from the Government for the intervening period. It is clear, therefore, that Congress in 1942 did not intend to change the basic statutory policy: the United States is to have the possession and use of the lawful tax at the date it is properly due.

To sustain respondent's contention would be to place a premium on failure to conform diligently with the law. For then a taxpayer who did not pay his taxes on time would receive the full use of the tax funds for the intervening period, while the taxpayer who did obey the statutory mandate and pay his lawful taxes promptly would be prohibited by § 3771 (e) from having the use of the money for that period. We cannot approve such a result.

Any other interpretation would be inconsistent with the present structure of the Code, as amended by § 4 (a) of the Tax Adjustment Act of 1945, 59 Stat. 519, now §§ 3779 and 3780 of the Code. Prior to 1945, the Commissioner had power to authorize, at the request of the taxpayer, an extension of time for the payment of taxes, and interest on such an extension was charged at the rate of six per cent.[14] The Tax Adjustment Act of 1945 was passed to improve the cash position of taxpayers by allowing them to defer current tax payments if there was a reasonable chance that these payments would be returned to them in the future because of business losses, and to speed up the refund of taxes paid. H. R. Rep. No. 849, 79th Cong., 1st Sess. 1–6 (1945); Joint Committee

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credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Tax Court, whichever is earlier; . . . ."

[14] Int. Rev. Code §§ 56 (c), 295.

on Internal Revenue Taxation, Rep. No. 1, 79th Cong., 1st Sess. 6–9 (1945). Under § 3779 a corporation filing its return for the preceding tax year has the right to obtain an extension of time for the payment of the tax for that preceding year. This extension may be obtained if the corporation expects to suffer, in the fiscal year in which the return is filed, a net operating loss sufficient to diminish, by a carry-back, its tax liability for the preceding tax years. At the close of that year, the taxpayer may file, under § 3780, an application for a tentative readjustment of taxes for preceding years, including a quick refund of taxes paid or an abatement of taxes which have been deferred. A corporation which does take advantage of these provisions is not completely absolved from the payment of interest on deferred taxes actually abated. For § 3779 (i) expressly provides that the corporation must pay three per cent interest on deferred taxes actually abated by the carry-back and six per cent on those not abated. Again it is apparent that the Code contemplates timely payment of taxes and subsumes the right of the United States to the interim use of the tax payments.

It is argued that the conclusion that respondent is not entitled to a refund of the assessed interest is unfair, allegedly discriminating against a taxpayer whose deficiency is assessed under the accelerated bankruptcy procedure in favor of one whose deficiency is assessed under § 272 (a) (1), the more customary "90-day letter" Tax Court procedure. This section provides that in the usual case the Commissioner must notify the taxpayer that he intends to assess a deficiency against him. The taxpayer is then allowed ninety days in which to file a petition with the Tax Court for a redetermination of the alleged deficiency, and the Commissioner is restrained from assessing any deficiency until the decision of the Tax Court becomes final. Nor may the Commissioner assess more than the amount the Tax Court determines to be the

deficiency. Section 292 (a), providing for interest on deficiencies, states, "Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency . . . ." The argument is that if there is no deficiency there can be no interest, and, it is further urged, the Tax Court will normally arrive at a result of no deficiency, for it will take into consideration the net operating loss carry-back in its redetermination. Therefore, no interest will be assessed.

At the time of the principal assessment in this case, however, the net operating loss had not yet been reported. Nor has the validity of the deficiency assessment been challenged at any time throughout the litigation. Thus, the comparable situation to the instant case would be, if, before the net operating loss was claimed, the Tax Court was confronted with a deficiency determined by the Commissioner. We see no reason why that method of assessment, or any of the others authorized by statute, would arrive at a different figure because of an unclaimed net operating loss. Whether the language of the Code requires a different result when the loss is claimed before the attempted assessment of the deficiency is a question which is not considered by us on this record. We hold that where a deficiency and interest have been validly assessed under any applicable statutory procedure, a subsequent carry-back with an abatement of the deficiency does not abate the interest previously assessed on that deficiency.

Respondent also places great reliance on the principle that "interest is an accretion to and part of the tax," and, therefore, must be abated when the tax is abated. The cases to which we have been referred in support of this principle deal with compromises of taxes which were incorrectly assessed at the outset, and not, as here, with a subsequent abatement of a tax correctly assessed. As such, they are not persuasive of a contrary result.

Two administrative rulings[15] on the carry-back provision of the Revenue Act of 1918, 40 Stat. 1057, are cited as opposed to this interpretation of the Code. We see no need to distinguish these regulations or decisions. Two rulings relating to a carry-back section of twenty-five years ago, not repeated in the intervening quarter-century, are not sufficient to force us to conclude that Congress intended to impart their construction of that section to the present provision.

We have considered the remainder of the points raised by the court below and respondent, but for the foregoing reasons are in accord that the judgment of the Court of Appeals must be reversed and the judgment of the District Court affirmed.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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[15] L. O. 1115, II–2 Cum. Bull. 221 (1923); I. T. 1447, I–2 Cum. Bull. 220 (1922).

CIVIL AERONAUTICS BOARD *v.* STATE AIRLINES, INC.

NO. 157. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued December 12, 1949.—Decided February 6, 1950.

Under the Civil Aeronautics Act of 1938, the Civil Aeronautics Board consolidated 45 route applications of 25 air lines into one area proceeding. After hearings, it made findings of fact as to what new routes should be established and which of the applicants could best serve these routes. It entered orders authorizing certificates of convenience and necessity for several new routes in the area. One applicant was authorized to engage in air transportation along certain of these routes which were different from those described in its applications. Its applications requested authority to transport on "the routes detailed herein, or such modification of such routes as the Board may find public necessity and convenience require" and also contained prayers for general relief. *Held:*

1. On the record in this case, the applications were sufficient to permit certification of this applicant for the routes awarded. Pp. 575–578.

(a) Except for the statutory requirement of written and verified applications, Congress plainly intended to leave the Board free to work out application procedures reasonably adapted to fair and orderly administration of its complex responsibilities. P. 576.

(b) In deciding that the policies of the Act could best be served in this case by a consolidated area proceeding, the Board did not exceed its procedural discretion. Pp. 576–577.

(c) In awarding routes varying from those specifically detailed in the applications in this case, the Board did not depart from congressional policy hinging certification generally on application procedures. Pp. 577–578.

(d) The standard adopted by the Board under which the public interest is given paramount consideration is a correct standard. Pp. 580–581.

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*Together with No. 158, *State Airlines, Inc.* v. *Civil Aeronautics Board et al.*, and No. 159, *Piedmont Aviation, Inc.* v. *State Airlines, Inc.*, also on certiorari to the same court.

2. On the record in this case, an unsuccessful applicant was not denied a fair hearing in the proceedings before the Board. Pp. 578–581.

3. On the record in this case, the Board's finding that the successful applicant was fit and able to perform the services authorized and was better qualified to do so than the unsuccessful applicant, was supported by substantial evidence and is sustained. Pp. 581–582.

84 U. S. App. D. C. 374, 174 F. 2d 510, reversed.

The Court of Appeals reversed an order of the Civil Aeronautics Board granting certificates of convenience and necessity for the operation of certain new air-line routes. 84 U. S. App. D. C. 374, 174 F. 2d 510. This Court granted certiorari. 338 U. S. 812. No. 158 *dismissed;* Nos. 157 and 159 *reversed,* p. 582.

Emory T. Nunneley, Jr. argued the cause for the Civil Aeronautics Board. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, Philip Elman, J. Roger Wollenberg* and *Warren L. Sharfman.*

Frederick W. P. Lorenzen argued the cause for State Airlines, Inc. With him on the brief was *Philip Schleit.*

Charles H. Murchison argued the cause for Piedmont Aviation, Inc., petitioner in No. 159 and respondent in No. 158. With him on the brief was *William A. Carter.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Acting under the Civil Aeronautics Act of 1938,[1] the Civil Aeronautics Board (C. A. B.) consolidated some 45 route applications of 25 airlines into one area proceeding, styled the "Southeastern States Case." After hearings, it made findings of fact as to what new routes should be established and which of the applicants could best serve these routes. It then entered orders authorizing certifi-

[1] 52 Stat. 973, 49 U. S. C. § 401 *et seq.*

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cates of convenience and necessity for several new routes in the area. Piedmont Aviation, Inc., was authorized to engage in air transportation of persons, property, and mail along certain of these routes. State Airlines, Inc., was denied authority to act as a carrier on any of them.[2] State filed a petition in the United States Court of Appeals for the District of Columbia Circuit asking that court to reverse the orders and remand the case to the Board with directions to grant carrier certificates to State instead of Piedmont.[3] The court reversed insofar as the orders awarded certificates to Piedmont but held that it was without power to direct the Board to certify State.[4] A crucial ground of the court's reversal was its finding that Piedmont had never filed an application for the particular routes certified, an indispensable prerequisite to certification as the Court of Appeals interpreted the Civil Aeronautics Act. A second ground for reversal was that since Piedmont had filed no application for the particular routes certified, State failed to have sufficient notice that the Board might consider Piedmont as a competing applicant, and thus was deprived of a fair opportunity to discredit Piedmont's fitness and ability to serve those routes. A third ground was that the Board's findings that Piedmont was fit and able to serve the routes "were, in the legal sense, arbitrary and capricious and lacked the support of substantial evidence." Both Piedmont and the Board petitioned for review of the court's reversal, while State cross-petitioned for review of the court's refusal to direct certification of State.[5] We

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[2] The several opinions of the Board are reported. 7 C. A. B. 863; 8 C. A. B. 585 and 716.

[3] Authority for judicial review is given by § 1006 of the Act, 52 Stat. 1024, 49 U. S. C. § 646.

[4] 84 U. S. App. D. C. 374, 174 F. 2d 510.

[5] The Board's petition is our Docket No. 157; Piedmont's is No. 159; State's cross-petition is No. 158.

granted certiorari because a final determination of the questions involved, particularly those involving interpretation of the Act, is of importance for future guidance of the Board in carrying out its congressionally imposed functions. 338 U. S. 812.

First. We hold that Piedmont's applications were sufficient to permit certification of Piedmont for the routes awarded. The contrary holding of the Court of Appeals rested primarily on its interpretation of § 401 (d) (1) and (2) of the Civil Aeronautics Act. The particular language most relied on by the court was that which empowers the Board to issue certificates "*authorizing the whole or any part of the transportation covered by the application,* if it finds that *the applicant* is fit, willing, and able to perform such transportation properly . . . ." (Italics used by the Court of Appeals.)[6] The Court of Appeals read this language as showing a congressional purpose to bar the Board from granting any certificates in which the routes awarded deviate more than slightly from the precise routes defined in the application. We

[6] There are slight but immaterial variants in the relevant language as it appears in (1) and (2) of § 401 (d). Those sections, as italicized by the Court of Appeals, read:

"(1) The Board shall issue a certificate *authorizing the whole or any part of the transportation covered by the application,* if it finds that *the applicant* is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter [originally this Act] and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

"(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate *authorizing the whole or any part thereof* for such limited periods as may be required by the public convenience and necessity, if it finds that *the applicant* is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder."

think that such a narrow interpretation is not compelled by the language of § 401 (d) and that the Act as a whole refutes any intent to freeze the Board's procedures in so rigid a mold.

The language of § 401 (d) (1) and (2) unqualifiedly gives the Board power, after application and appropriate findings, to issue certificates for the whole or any part of transportation covered in an application. This manifests a purpose generally to gear the award of certificates to an application procedure. But Congress made no attempt in (1) and (2) of § 401 (d) to define the full reach or contents of an application. These subsections do not even require an applicant to designate the terminal cities or the intermediate points a proposed route would serve. A different provision, § 401 (b), contains the only requirements directly imposed by Congress—that an application must be in writing and verified.[7] With this one exception, § 401 (b) provides that an application "shall be in such form and contain such information . . . as the Board shall by regulation require." And in § 1001 Congress granted the Board authority to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Thus, except for the statutory requirement of written and verified applications, Congress plainly intended to leave the Board free to work out application procedures reasonably adapted to fair and orderly administration of its complex responsibilities.

Here the Board decided that the policies of the Act could best be served by a consolidated area proceeding. In doing so it did not exceed its procedural discretion.

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[7] "Application for a certificate shall be made in writing to the [Board] and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the [Board] shall by regulation require." Civil Aeronautics Act of 1938, as amended, § 401 (b).

Only through such joint hearings could the Board expeditiously decide what new routes should be established, if any, and which of the numerous applicants should be selected as appropriate carriers for different routes. And in such a proceeding, as the Board has found, limiting all applications to the precise routes they describe would destroy necessary flexibility. For the Board's decision as to what new routes are actually available is not reached until long after the applications are filed. Recognizing this, Piedmont, like other airlines, inserted a so-called "catchall clause" in its applications, broadly requesting authority to transport on "the routes detailed herein, or such modification of such routes as the Board may find public convenience and necessity require." It also included a general prayer "for such other and further relief, general and specific, under Section 401 of the . . . Act . . . as the Board may deem appropriate, and to which the applicant may be entitled in any proceeding in which the application may be heard in part or in its entirety."

We are convinced that the Board, in awarding routes varying from those specifically detailed in Piedmont's application, has not departed from the congressional policy hinging certification generally on application procedures. While the routes sought by Piedmont did differ markedly from those awarded,[8] they were all in the general area covered by the consolidated hearings. All

[8] The Court of Appeals placed in its opinion two maps charting the passenger routes applied for by Piedmont and State and indicating that the routes awarded Piedmont far more nearly approximated those sought by State. The Board and State take the position that these maps do not show all of the points and routes applied for by either airline, and the Court of Appeals said as much with reference to the maps. But the view we take makes it unnecessary to elaborate the different views as to the precise routes for which Piedmont and State applied.

twenty-five applicants had asked for routes somewhere in the area, and many of these routes overlapped. In such an area proceeding it would exalt imaginary procedural rights above the public interest to hold that the Board is hamstrung by the lack of foresight or skill of a draftsman in describing routes. The flexible requirements set by the Board were reasonable. They accorded with the policies of the Act. The Board in well-considered opinions held that Piedmont's application met these requirements. That application also met the congressional requirements of writing and verification. So far as § 401 (d) (1) and (2) are concerned, the Board acted within its power in entering the orders.

Second. The Court of Appeals recognized that full hearings were held in the area proceedings after due notice to all interested parties. But that court nevertheless held that State was without adequate notice that the Board might consider Piedmont as an applicant for routes encroaching on those sought by State. This contention largely rests on the statutory interpretation we have rejected. State argues, however, that since it never considered Piedmont as a possible applicant for the routes awarded, it failed to produce available evidence and arguments to convince the Board that Piedmont was not fit and able to serve as a carrier on the routes.

This challenge is substantial. The Board's major standard is the public interest in having convenient routes served by fit and able carriers. These questions are to be determined in hearings after notice. The prime purpose of allowing interested persons to offer evidence is to give the Board the advantage of all available information as a basis for its selection of the applicant best qualified to serve the public interest. *Cf. Federal Communications Comm'n* v. *Sanders Radio Station,* 309 U. S. 470, 477. If the Board had neglected this purpose, State could rightly complain.

Here, however, we find that the Board fully appreciated its responsibility in this respect. It seems plain to us from the entire record that State did fully recognize that Piedmont was a potential competitive applicant in the consolidated proceedings. Their applications in large part sought certificates in the same general area. Each argued against the other before the Board.

Moreover, after issuance of the order, the Board granted State a limited rehearing to show, if it could, that the proceeding should be reopened to enable State to offer new evidence against Piedmont's fitness and ability. In the rehearing argument, State's main contention was that the Board lacked jurisdiction because of the limited nature of Piedmont's application, a contention we have already rejected. But State also contended that had it known Piedmont to be an actual competitor, State would have made diligent efforts by cross-examination and otherwise to prevent the Board's finding that Piedmont's qualifications were superior to State's. The record reveals that the Board gave most careful consideration to all the contentions made by State's counsel. The Board in an opinion discussed each of those contentions. 8 C. A. B. 716. With particular reference to the general contention that in reopened proceedings State could offer evidence to refute the Board's findings of Piedmont's superior qualifications, the Board said: "Although in the course of the subsequent argument State asserted that had it been aware of the situation it might have presented additional or different evidence and would have enlarged upon its inquiries into Piedmont's case, it did not, in the course of the argument or in its petition for reconsideration, specify what the nature of such additional evidence or inquiries would have been." [9] *Id.*, at 721. It was in this setting

[9] The record does show a statement by State's counsel, made near the end of the rehearing argument, that "had State known that Piedmont was an applicant for these routes" it could have proven in

that the Board held State's showing inadequate to justify new hearings concerning the respective qualifications of State and Piedmont. In reaffirming its previous holding of Piedmont's superior qualifications, the Board said: "The only practical approach that can be taken in cases of this type is to consider the applications, not with a view as to how an individual proposal would benefit the applicant, or whether a particular proposed route is required precisely as set forth in an application, but rather to consider the entire case with the objective of establishing a sound transportation pattern in the area involved." [10] 8 C. A. B. at 722.

We think the standard adopted by the Board under which the public interest is given a paramount consideration is a correct standard. And since the Board's con-

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the original hearings that Piedmont did not have "facilities for all types of overhaul." It may be that this general suggestion can be considered as a request by State to reopen the proceedings for proof on this particular single point. If so considered, it is sufficient to point out that the Board found that Piedmont had adequate financing to obtain all necessary equipment, which is a major consideration in determining the comparative fitness and ability as between applicants who propose to operate newly established routes. See the case cited in the Board's opinion, *American Export Airlines, Inc., Trans-Atlantic Service*, 2 C. A. B. 16, 38 (1940).

[10] In this Court a suggestion is made that two sentences by one member of the Board during the rehearing argument indicate that the Board acted on a wrong standard of public interest: "Yes, but apart from all these legalisms, isn't the real issue whether or not we made a mistake and picked a carrier who cannot run this route? If we really get down and try to find what is the public interest, isn't that the real point?" It is said that this statement departs from the standard of "public interest, convenience, or necessity." But in the statement itself the Board member pointed out that the proper standard was "the public interest." Moreover, he went on to say that "the important thing is not whether you win or Piedmont wins but whether the people of North Carolina and Kentucky and Virginia and that area in there get the kind of service that they should."

clusion that the proceeding should not be reopened represents its informed judgment after a searching inquiry, we accept its conclusion. Because of the foregoing and other circumstances disclosed by the record we think there is no ground for State's contention that it failed to have a fair hearing. See *Chicago, St. Paul, Minneapolis & Omaha R. Co.* v. *United States,* 322 U. S. 1, 3.

Third. During the rehearing argument, counsel for State was asked by a member of the Board whether State took the position that Piedmont was "not capable of running the route that was awarded." He replied: "We are taking the position that both State and Piedmont are fit and able, it's a question of which has demonstrated in this record to be more fit, willing and able." State nevertheless contends here, and the Court of Appeals held, that there was no sufficient evidence to support the Board's finding of Piedmont's fitness and ability. This contention, like others, rests almost wholly on the argument that Piedmont had not applied for the particular routes awarded and thus could not have evidenced its ability to handle those routes. The Court of Appeals also emphasized the fact that the routes awarded required Piedmont to transport over mountains, whereas the detailed passenger routes for which it had applied would not have crossed the mountains; it contrasted this with State's applications, which had specifically shown routes crossing the mountains. Precisely what added skills, if any, are required for flights across mountains is a matter of proof. In the extensive hearings held in this area proceeding, each applicant was required to and did offer evidence concerning fitness and ability. Much of this evidence concerned the financial condition and experience in aviation of both Piedmont and State. The Board's opinions show the painstaking consideration given this evidence. The Board found both airlines fit and able, but found the evidence of qualifi-

cations as between the two weighted on Piedmont's side. We hold that the conclusion was supported by substantial evidence.

In view of our conclusion we need not consider the allegations of State's cross-petition in No. 158 and that case is therefore dismissed. In Nos. 157 and 159 the judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE REED, with whom MR. JUSTICE FRANKFURTER joins, dissenting.

The Civil Aeronautics Board has been authorized by Congress to award certificates of convenience and necessity to applicants for air routes. The Board may give to one applicant, and deny to others, the exclusive privilege of serving an air route to the applicant's private profit. A determination by the Board, however, involves more than a choice among competing individuals; the Board has been made the guardian of the national interest and the arbiter of the conflicting concerns of various communities. The interests to be protected are so important that Congress has legislated to insure that those seeking this unique public privilege be not insulated from challenge and competition. The Civil Aeronautics Act provides, 52 Stat. 987, § 401:

"Application for Certificate

"(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

"Notice of Application

"(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible.

"Issuance of Certificate

"(d) (1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

The procedures so defined by Congress provide the frame within which the Board's discretion may freely move. So long as that discretion is exercised within the frame, the courts should not interfere. But because the responsibility placed in the Board by Congress is great, and because the damage a Board error in awarding a certificate may cause to other carriers and the public is irreparable, the courts should insist that the procedures be strictly followed.

They were not followed here. In 1945 the Civil Aeronautics Board consolidated for a common hearing the

applications, particularized as required by the statute and regulations, of twenty-five air-line companies which had filed documents seeking certificates for forty-five specific routes, varying considerably, but all within an area that extends roughly from Maryland to Florida, Virginia to Missouri. After settling upon the few routes to be awarded, the Commission, without further notice to anyone, selected for one of these Piedmont, which had asked for a quite different route. How much the route granted differed from that applied for may be seen readily by a glance at the maps in 84 U. S. App. D. C. 374, 377, 174 F. 2d 510, 513. This Court says it differed "markedly."

An administrative body must follow carefully the specific requirements laid down by Congress to protect the public from administrative absolutism. To insist that the statute be followed is not mere search for precision. The fact that State knew of the award of the route to Piedmont in time to apply for a rehearing does not justify the failure of the Board to give not only State, but others as well, an opportunity to contest fairly for the selected route before the Board's opinions crystallized.

Since the error of the Board lay in its failure to follow required procedure, it should be enough to call for a new determination if on additional evidence from State or the public, or on a different manner of presentation, the Board might have made its award to a carrier other than Piedmont. That it is not fanciful to assume it might have done so may be inferred from the statement of the Board in its first opinion that even then the choice between State and Piedmont was "a close and difficult question." 7 C. A. B. 863, 901. Moreover, when the limited rehearing was granted, the issue, at least in the mind of one member of the Commission, may have shifted. At one point this member said: "Yes, but apart from all these legalisms, isn't the real issue whether or not we made a mistake and picked a carrier who cannot

run this route? If we really get down and try to find what is the public interest, isn't that the real point?" This is quite different from the question of which carrier can best serve the public interest, convenience and necessity.

I see no objection to a proceeding in which applications for separately defined routes in a single large region are considered together. But within the framework of an "area proceeding" the procedure for notice required by the statute should have been followed. After deciding on the routes for the "area," the Board should have permitted applicants to amend their applications to conform with the selected routes. Such material changes as Piedmont would have had to make would have required public notice under § 401 (c) of the statute, and thus the attention of competing air lines and interested municipalities would have been directed to the controlling question of which air line would best serve the public interest on the selected route. This would have been the "proper dispatch" of business that the statute requires.

It is true that a remand might well result in the issuance again of a certificate to Piedmont. That award, however, would be on an amended application and on proper notice, and, at least, the public and Piedmont's possible competitors would have an opportunity to be heard after preparation and in regular course.

The judgment of the Court of Appeals should be affirmed.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA *v.* CARROLL ET AL.

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

No. 83. Argued December 9, 1949.—Decided February 6, 1950.

1. The Federal Communications Commission renewed a license for a radio station only after the applicant (petitioner here), pursuant to a condition prescribed by the Commission and without respondents' consent, repudiated a contract with respondents. The Commission had determined that, unless the contract were given "no further effect," a renewal of the license would not be in the public interest. This was based on findings that the contract jeopardized petitioner's financial position and that it allowed respondents to profit from a situation created by a previous contract with petitioner which the Commission had held illegal. Respondents were not parties to the proceedings before the Commission and did not seek to intervene; but they subsequently sued in a state court and obtained a judgment for the amount due under the contract. *Held:* The judgment of the state court did not contravene the Supremacy Clause of Article VI of the Constitution. Pp. 587–603.
2. Whether petitioner was entitled to have its defense of impossibility of performance sustained is a question of state law. P. 594.
3. Under the Communications Act of 1934, the Commission's regulatory powers center around the grant or revocation of licenses. Pp. 594–600.
4. Under § 303 (r) of the Act, authorizing the Commission to prescribe such "conditions" as are "necessary to carry out the provisions" of the Act, the Commission may impose conditions which an applicant must meet before it will be granted a license; but imposition of such conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant. P. 600.
5. The Commission could insist that the applicant change its situation before it granted a license; but it could not act as a bankruptcy court to change the situation for the applicant. Pp. 600–602.
6. The Act does not authorize the Commission to determine the validity of contracts between licensees and others. P. 602.

7. A different result is not required by the fact that respondents had knowledge of the Commission's action in denying a license unless the contract were given "no effect" and they made no effort to intervene in the proceedings before the Commission. Pp. 602–603.

78 Ga. App. 292, 50 S. E. 2d 808, affirmed.

Notwithstanding an order of the Federal Communications Commission (11 F. C. C. 71) renewing petitioner's license for a radio station on condition that petitioner repudiate a contract with respondents, a Georgia court awarded respondents a judgment for the amount due under the contract. The Court of Appeals of Georgia affirmed. 78 Ga. App. 292, 50 S. E. 2d 808. The Supreme Court of Georgia denied certiorari. 78 Ga. App. 898. This Court granted certiorari. 338 U. S. 846. *Affirmed,* p. 603.

Hamilton Lokey, Deputy Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the brief was *Eugene Cook,* Attorney General.

James A. Branch argued the cause for respondents. With him on the brief was *Thomas B. Branch, Jr.*

By special leave of Court, *Max Goldman* argued the cause for the Federal Communications Commission, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Perlman, Stanley M. Silverberg, Benedict P. Cottone* and *Richard A. Solomon.*

Mr. Justice Reed delivered the opinion of the Court.

The Federal Communications Commission renewed a radio license only after the applicant, the Board of Regents, carried out a required repudiation of a contract with other persons, respondents here. The Commission had determined that unless the contract were given "no further effect" a renewal of the license would not be in the public interest. This was based on findings that the

contract seriously jeopardized the applicant's financial position and that it allowed the other persons to profit from a situation created by a previous contract with the applicant that the Commission had held illegal. May a state now enforce the repudiated contract against the applicant although this would have the practical effect of nullifying the repudiation required by the Commission? That is the federal question presented in this proceeding.

The question arises in this way. The Georgia School of Technology received radio station WGST in 1923 as a gift. Petitioner [1] operated the station until January 1930, when it made a contract with the Southern Broadcasting Company for the operation of the station. The contract was to run for a ten-year period, and the company was to receive all the earnings of the station except a percentage of the gross receipts. This percentage, which varied up to 10%, was to be paid Regents. Southern Broadcasting Stations, Inc., of which respondents are the former stockholders, succeeded to the rights of the company. The contract was extended for a period to end January 6, 1950. On execution both the original contract and the extension were filed with the Commission. 10 F. C. C. 110, 114.

Various renewals of petitioner's license were made during this period, but when petitioner applied for a renewal

[1] As nothing of importance in this case turns upon the details of title, we hereafter refer to the petitioner as petitioner or Regents. We treat it as owner, applicant for license or licensee. Contracts for the operation of WGST were made by the Board of Trustees of the Georgia School of Technology until by state legislation management of the School affairs passed from that Board to the Board of Regents of the University System of Georgia. Thereafter the Regents handled the station for the School. The applications for license have been made and the licenses issued in the name of the Georgia School of Technology.

in 1940, the Federal Communications Commission ordered a hearing to determine whether the contract arrangement constituted a violation of the Federal Communications Act and whether renewal of the license to petitioner would serve the public interest, convenience and necessity. Southern was permitted to intervene in the proceeding.

The Commission found that although the contract provided that its execution should not release the licensee from its right and duty to maintain general control over the station, actually petitioner had exercised only nominal authority. The contract itself stipulated that Southern should arrange the programs and attend to all program details. In the operations under the contract Southern had purchased additional equipment and apparatus without consulting with petitioner, and since 1930 nothing had been spent by petitioner for purchase or maintenance of the equipment. Southern had contracted in its own name with buyers of broadcasting time and for network service.

From these facts the Commission determined that Southern's operation of petitioner's station violated the Commission's rule that a licensee must be responsible for the control and operation of the station, and that a licensee may not transfer to any person its responsibility as licensee except with the Commission's written consent. It also held that the Communications Act of 1934 had been violated.[2]

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[2] 10 F. C. C. 110, 120. The Commission based its ruling particularly on its interpretation of the rule in F. C. C. Rules & Regulations § 1.364 (Part I, Revised to Feb. 1, 1945), and on §§ 301, 307, 308, 309 and 310 of the Communications Act (47 U. S. C.). It also called attention to the application form for renewals, one of the questions on which, No. 11c, asked: "Does applicant have absolute control of station, both as to physical operation and programs broadcast?"

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The Commission issued proposed findings of fact and conclusions of law on March 23, 1943. This decision refused the application for renewal of the license. It said, however, that "The Commission will consider the issuance of a renewal of the license to Georgia School of Technology provided the Commission is given assurance that the applicant is prepared to and will in fact assume and discharge the full responsibilities of a licensee." 10 F. C. C. at 121. It permitted temporary continued operation. The proposal was adopted by the Commission May 8, 1943. No appeal was taken by petitioner or respondents from this order. See 47 U. S. C. § 402.

In order to obviate the Commission's objection to Southern's operation of the station, petitioner on April 15, 1943, entered into the contract here in issue. Under it petitioner purchased from respondents all the shares of stock of Southern, and, as the consideration, agreed to pay each month a sum equal to 15% of the net billings [3] of the station until January 6, 1950. Petitioner proceeded to liquidate Southern and to transfer the assets, consisting of station equipment, broadcasting contracts and sundries, to itself in trust for the Georgia School of Technology. Since July 9, 1943, petitioner has itself managed, directed and controlled the affairs of the station.

On May 23, 1943, petitioner filed another application for renewal of its license. While respondents had actual knowledge of this second proceeding, they were never parties to it by intervention or otherwise. After hearings, the Commission held that the public interest, convenience or necessity would not be served by a grant of the application. Estimating that under the new contract petitioner would be paying out 70% of the net earnings

[3] *I. e.*, the sales of broadcasting time less commissions or disbursements to others.

of the station, it found that petitioner's financial ability to conduct the station in the public interest would be jeopardized. It was concerned especially because it thought that the use of so much of the station income for the contract obligations would lessen the station's ability to enter the fields of FM and television. The Commission also found that the contract represented an effort to give further effect to the earlier managerial arrangements, which it had held violative of the Act and its regulations. It thought that the agreed price for the stock—estimated at over $300,000—was excessive because the equipment had only an estimated value of $50,000. Southern's title to that was questionable, and Southern had no "legal interest" in the operation of the station. While the Commission did not undertake to pass upon the validity of the stock purchase contract as a matter of contract law, it concluded (11 F. C. C. 71, 76):

> "A grant of the renewal application under circumstances where a party to an arrangement found by the Commission to be in contravention of law would continue to profit from such arrangement would not be in the public interest since it would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the act."

The Commission on September 19, 1945, again denied the application, but it allowed the petitioner to continue operations and to make a new application, provided it should affirmatively show "that no further effect is given to the agreements" between petitioner and respondents. One of these agreements is the stock purchase contract involved in this present litigation.

Thereupon, the Regents on October 11, 1945, adopted a resolution repudiating the stock purchase contract, and added a copy of the resolution to its pending applica-

tion for renewal of its license.[4] By a statement attached to its application, the Regents informed the Commission that respondents had been notified of the resolution and announced that no settlement would be made with respondents without Commission approval.[5] Respondents do not deny notice of the repudiation. On March 7, 1946, the Commission issued to petitioner the requested license, and has since renewed it for the period ending May 1, 1950. Thus petitioner has been able to operate its station without interruption throughout the years.

Until the repudiation, the agreed payments had been made under the contract. After the notice to respondents petitioner made no further payments, nor did it at any time, so far as the record indicates, make any effort or offer to return to respondents the property and the

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[4] "Resolved, by the Board of Regents of the University System of Georgia that the ruling of the Federal Communications Commission having made the contract with the stockholders of Southern Broadcasting Stations, Inc. legally impossible of performance, the board hereby approves the action of its WGST Radio Committee in directing that said contract be not further complied with. This action is taken without prejudice to a fair adjustment or settlement of whatever rights the said stockholders may have, subject to the approval or consent of the Federal Communications Commission."

[5] "The agreement effective April 15, 1943, was cancelled by the Regents of the University System of Georgia by resolution adopted at a meeting of the Board of Regents held on October 11, 1945. A true and correct copy of the resolution is hereto attached as Exhibit J. The other parties to the agreement have been notified orally of the cancellation of the agreement and no payments under the agreement have been made since the issuance of the proposed decision of the Commission in Docket No. 6534 on September 20, 1945. The Board of Regents will not undertake to negotiate any adjustment or settlement with the other parties to the agreement unless and until said parties first obtain the approval or consent of the Federal Communications Commission to negotiate a settlement of whatever rights said parties may have under the agreement."

intangible assets acquired through the contract. The Regents cannot now restore the parties to their former position. The proceeding on review was brought by the respondents for an accounting on the contract in the Superior Court of Fulton County, Georgia, in June, 1947, for the sums accruing from August, 1945.

Petitioner defended the action on the ground that to permit recovery would be an interference with the Commission's power over broadcasting. It also contended that the Commission's requirement of disaffirmance made the purchase contract impossible of performance.[6] The case was submitted by stipulation and documentary evidence, and there was no conflict as to the facts. The trial court entered a judgment for the amounts due under the contract through August, 1947, some $145,000. The court held that "The Federal Communications Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943." It also decided that the Commission order requiring disaffirmance of the purchase contract "does not constitute a valid defense or bar as a matter of fact or law to the right of the plaintiffs to enforce the provisions of the contract of April 15, 1943, on the ground that said order has rendered performance

[6] There are further allegations of defense in the answer that may be summarized as a statement that respondents had actual knowledge of the filing of the renewal application that resulted in issuance of the license; that respondents had actual knowledge of the hearings, of the proposed decision and of the final order of the Commission. The petitioner further alleged that respondents knew the operation of the station depended upon the grant of a license.

We consider these allegations as to notice only as they bear upon the effect of the Board order on petitioner's responsibility under the contract. Petitioner did not plead them as an estoppel to recovery. Neither of the Georgia courts treated the allegations as a basis of estoppel under the law of Georgia. This would be a matter of state law.

on the part of the defendant Board of Regents impossible."

The Court of Appeals of Georgia accepted the trial court's determinations and affirmed.[7] Since an important question of the relation of federal administrative power to state judicial power was involved, we granted certiorari. 338 U. S. 846.

We may summarily dispose of the defense of impossibility of performance. It is a matter of state law. It was a defense made in a state court to a contract entered into under the law of Georgia. Since petitioner actually was an operating licensee up to the entry of the judgment, the state court thought petitioner remained liable under the contract.

Whatever power the Federal Communications Commission had to affect the rights of the parties under these contracts rests on the Communications Act of 1934 and its amendments. The sections pertinent to the determination of this case appear in the margin.[8]

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[7] 78 Ga. App. 292, 50 S. E. 2d 808 (cert. by the Sup. Ct. of Georgia denied, 78 Ga. App. 898).

[8] 47 U. S. C.:

§ 151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make [it] available, so far as possible, to all the people of the United States . . . there is created a commission to be known as the 'Federal Communications Commission' . . . ."

§ 154. "(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

§ 301. "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . , except under and in accordance

To lay bare the controlling issue in this case, we can remove several matters from discussion as not significant to our decision. There is no challenge to the Commission's ruling that Southern's operation of the station vio-

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with this chapter and with a license in that behalf granted under the provisions of this chapter."

§ 303. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . . . .

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, ..."

§ 307. "(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

§ 307. "(d) . . . but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."

§ 308. "(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; . . . ."

§ 309. "(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. . . ."

§ 310. "(b) The station license required, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

§ 312. "(a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 of this title, or because of conditions

lated § 310 (b) and the regulations in that it constituted a transfer of the licensee's responsibilities without consent of the Commission.[9] We assume its soundness. Similarly we accept the ruling that the payments contemplated under the stock purchase contract made the petitioner financially unacceptable as a licensee,[10] and we assume the validity of the Commission's conclusion that petitioner might be denied a license because the price promised respondents under the stock purchase contract permitted them to profit from their prior invalid arrangement.[11] Thus our inquiry is narrowed to the point of whether in the light of the Supremacy Clause of the Constitution a state may enter a judgment that grants respondents a recovery on the very stock purchase contract that justified the Commission's refusal of a license.[12]

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revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: . . . ."

§ 405. "After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: . . . ."

[9] 10 F. C. C. 110, 120; 11 F. C. C. 71, 76.

[10] 11 F. C. C. 71 at 75; see § 308 (b), note 8. See *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 475.

[11] 11 F. C. C. 71, 76.

[12] The Georgia court similarly conceived the issue:

"The Federal Communications Commission is an administrative agency of the Federal Government, empowered to enforce the provisions of the Communications Act of 1934 (47 U. S. C. A., § 151, et seq.), and has the power and authority to grant or refuse licenses to radio-broadcasting stations, with a view to subserving the

Our former decisions interpretative of the Communications Act furnish a basis for examining this question. As an administrative body, the Commission must find its powers within the compass of the authority given

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public interest so that the people shall have the best possible radio service; but nothing in the power granted to the commission, or in said communications act of Congress, gives to the commission the power and authority to regulate the private contracts and business of those operating radio-broadcasting stations, where the same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station." 78 Ga. App. 292, 50 S. E. 2d 808, 809.

"The Federal Communications Commission has power in the 'public interest' under said act to refuse licenses to stations which engage in practices contrary to the public interest, convenience, or necessity. In each case that comes before it, the commission must exercise ultimate judgment whether the grant of a license in the particular instance would serve the public interest, convenience or necessity. . . .

"The Federal Communications Commission has the power and authority in granting a license to a radio station to see that the public interest and convenience are subserved thereby, and an important element of public interest and convenience affecting the issue of a radio-broadcasting license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. The commission must see to it that all applicants for radio-station licenses have the necessary technical ability to broadcast programs, and that the stations are properly constructed and properly and adequately manned and do not interfere with other stations, and that all licensees are responsible, morally and financially. . . ." 78 Ga. App. 298–99, 50 S. E. 2d 812, 813.

". . . Matters of private concern, and contracts affecting such rights, which do not have as their subject-matter the rights conferred by a license, or do not substantially affect such rights, are not within the scope of the commission's power to regulate and control in the public interest broadcasting by radio stations and licenses to such stations. . . ." 78 Ga. App. 300, 50 S. E. 2d 813.

There is some language in the opinion (78 Ga. App. 292, 302, 50 S. E. 2d 808, 814) from which it might be inferred that the Court of Appeals thought that it could review the conclusion of the Commission that the issuance of the license with the contract in effect would adversely affect the public interest. In view of the statements above

it by Congress.[13] When to assert its undoubted power to regulate radio channels,[14] Congress set up the Federal Communications Commission, it prescribed licensing as the method of regulation. 47 U. S. C. § 307. In its action on licenses, the Commission is to be guided by what we have called the "touchstone" of "public convenience, interest, or necessity." [15] Since the licensee receives no rights in the channel beyond the term of its license, the Commission may grant a license to a competitor even though it results in an economic injury to an existing station.[16] Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 475; *National Broadcasting Co., Inc.* v.

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and the general tenor of the opinion, we are satisfied that the Court of Appeals did not claim a power to decide the contract's effect upon an applicant's ability to meet the requirements necessary for a license from the Commission. The Court of Appeals bottomed its decision on the lack of power in the Commission to affect legal responsibility under this contract.

[13] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Helvering* v. *Sabine Trans. Co.*, 318 U. S. 306, 311; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617–18; *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327, 333, dissent, 335. Cf. § 9 (a) Administrative Procedure Act, 60 Stat. 242:

"SEC. 9. In the exercise of any power or authority—

"(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

[14] *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279; *National Broadcasting Co., Inc.* v. *United States*, 319 U. S. 190, 210.

[15] *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138; *National Broadcasting Co., Inc.* v. *United States*, 319 U. S. 190, 216. 47 U. S. C. § 307 (a).

[16] *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 473, 475, 476.

United States, 319 U. S. 190, 218, 227. These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.[17]

Radio Station WOW, Inc. v. *Johnson,* 326 U. S. 120, which required an examination into the respective powers of state courts and the Communications Commission, is particularly applicable to this case. The owner of licensed station WOW had leased the facilities for a term of years and had secured approval from the Commission of a transfer of the license to the lessee. The state courts set aside the lease for fraud and ordered a retransfer of the physical facilities to the lessor. The essential holding, so far as it relates to our present problem, lies in these words at p. 131:

> "We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station."

In the *WOW* case, the Commission had not passed upon the question of fraud, but if at the time of the state adjudication there had been a finding by the Commission

[17] The Communications Act has no provision such as appears in the National Labor Relations Act, § 10 (c), 49 Stat. 454, authorizing the Labor Board to require affirmative action from those who violate the Labor Act. Yet, even in cases under that Act, third persons were left free to assert rights under their contracts. *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 365.

that the facts did not justify a refusal to transfer the license, this finding would not have affected the right of the state court to determine independently the issue of fraud.

We now come to consider the arguments put forward to show that under the Act the Commission's orders are effective to bar recovery. One suggestion is that petitioner's position has a specific statutory basis in § 303 (r), which permits the Commission to prescribe such "conditions" as are "necessary to carry out the provisions" of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. It is in connection with this power that § 303 (r) is to be interpreted. The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant.

Petitioner also urges that a state court judgment should not be allowed to thwart the Commission's efforts to enforce the requirements of the Act.[18] Since the Communications Act does not specifically empower the Commission to adjudicate the contractual liability of a licensee for its contracts or to declare a licensee's contracts unenforceable in the courts, for this defense petitioner must depend upon general implications from the Act.

The argument is that if before it issues a license the Commission cannot be assured that it has secured an effective cancellation of a contract like the one in suit, it must choose between two undesirable alternatives. It must either condone the violation of its rules for operation and forsake its duty to insure that only the financially

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[18] 11 F. C. C. 71, 76.

able may be licensees, or it must deprive the public of the advantage of a station under the management of the Board of Regents.

The renewal application indeed presented the Commission with a hard choice. For ten years the operating arrangement had continued. Suddenly, after the station had been brought to a favorable profit position under Southern's management, the Commission became conscious of the violation of law involved in the management contract. When the management contract was superseded by the purchase contract, the Commission insisted that petitioner could not be a suitable licensee unless the latter contract were given "no effect." For some reason, which has not been explained to us, the Commission was satisfied that the contract was of "no effect" when the petitioner made a unilateral disaffirmance, and it did not think it necessary to require that Southern agree to the cancellation before a license would issue.

This choice of method lay within the Commission's power. Considerations unknown to us may have dictated this procedure. Before issuing a license in similar cases, however, the Commission has successfully obtained from both parties to a contract clear and unequivocal assent to its cancellation.[19] Indeed, the Commission might refuse to issue a license until the applicant has demonstrated that it has been freed by the state courts from the obnoxious contract.[20]

But if the Commission was placed in a dilemma from which it had no escape, that dilemma was the inevitable result of the statutory scheme of licensing. The Com-

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[19] *Matter of Westinghouse Electric and Manufacturing Co.*, 8 F. C. C. 195; *In re Cornell University* (*WHCU*), Docket No. 5820 (Order, Oct. 15, 1940).

[20] See *Matter of the City of Camden* (*WCAM*), 4 Pike and Fischer Radio Regulations 344, 384.

mission itself has indicated to Congress that it is embarrassed by its inability to issue cease and desist orders, that it has at its disposal only the cumbersome weapons of criminal penalties and license refusal and revocation.[21] But, so far as we are aware, the Commission request did not go beyond asking for power to issue a cease and desist order against a licensee. No power was sought against a third party. Under the present statute, the Commission could make a choice only within the scope of its licensing power, *i. e.*, to grant or deny the license on the basis of the situation of the applicant. It could insist that the applicant change its situation before it granted a license, but it could not act as a bankruptcy court to change that situation for the applicant. The public interest, after all, is in the effective use of the available channels, and only to that extent in what particular applicant receives a license.[22] The Commission has said frequently that controversies as to rights between licensees and others are outside the ambit of its powers.[23] We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others.

Finally, we find irrelevant the fact that respondents had knowledge of the Commission proceeding denying a license unless the stock purchase contract were given "no effect." Even if we should assume that respondents had the right to intervene in that proceeding and to

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[21] Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess. 14, 51.

[22] *National Broadcasting Co., Inc.* v. *United States, supra,* at 215–16, 218.

[23] See *In re Petition of Fannie I. Leese et al.,* 5 F. C. C. 364; *Matter of Hearst Radio, Inc.,* 7 F. C. C. 292, 295; *In re Assignment of License of Station WMCA,* 10 F. C. C. 241, 242.

appeal from the Commission's decision, their failure to do so could not destroy their rights under the contract. It could affect them no more than to prevent them from challenging in any court the Commission's decision that a license might be denied Regents for the reasons given by the Commission.[24] We have assumed the correctness of the refusal to grant a license, but we hold that the Commission's order cannot directly affect the validity of the contract. It is a most extraordinary rule that would require respondents to intervene upon pain of suffering a binding judgment which the Commission could not have lawfully imposed upon them had they been actual parties.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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[24] See *Red River Broadcasting Co.* v. *Federal Communications Commission,* 69 App. D. C. 1, 98 F. 2d 282.

SECRETARY OF AGRICULTURE *v.* CENTRAL ROIG REFINING CO. ET AL.

NO. 27. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued October 17, 1949.—Decided February 6, 1950.

1. Section 205 (a) of the Sugar Act of 1948 authorizes the Secretary of Agriculture to make allotments of sugar quotas which may be marketed in the United States, and requires that he do so "in such manner and in such amounts as to provide a fair, efficient, and equitable distribution" of the quota, "by taking into consideration" (1) processings to which proportionate shares pertained, (2) past marketings, and (3) ability to market. In issuing Puerto Rico Sugar Order No. 18, which allotted among the various Puerto Rican refineries the 1948 quota of Puerto Rican refined sugar which could be marketed on the mainland, the Secretary took as the measure of "past marketings" the average of the highest five years of marketings during the 1935–1941 period; took as the measure of "ability to market" the highest marketings of any year during the 1935–1947 period; gave equal weight to these factors; and considered, but concluded to give no weight to, processings to which proportionate shares pertained. *Held:* He did not act arbitrarily or exceed the authority granted him by the Act. Pp. 605–614.
2. The Sugar Act of 1948, as applied in Puerto Rico Sugar Order No. 18, is a valid exercise of the power of Congress under the Commerce Clause and does not violate the Due Process Clause of the Fifth Amendment. Pp. 614–619.
3. In view of the conclusion reached on the constitutional issues, which had to be met apart from any jurisdictional question, it is unnecessary in this case to decide the question of Puerto Rico's standing to sue. Pp. 619–620.

84 U. S. App. D. C. 161, 171 F. 2d 1016, reversed.

On appeals from an order issued by the Secretary of Agriculture under the Sugar Act of 1948, the Court of

*Together with No. 30, *Porto Rican American Sugar Refinery, Inc.* v. *Central Roig Refining Co. et al.*, and No. 32, *Puerto Rico* v. *Secretary of Agriculture et al.*, also on certiorari to the same court.

Appeals reversed the order as not authorized by the Act. 84 U. S. App. D. C. 161, 171 F. 2d 1016. This Court granted certiorari. 336 U. S. 959. Nos. 27 and 30 *reversed;* No. 32 *dismissed,* p. 620.

Neil Brooks argued the cause for the Secretary of Agriculture, petitioner in No. 27 and respondent in No. 32. With him on the brief were *Solicitor General Perlman, Joseph W. Bishop, Jr., W. Carroll Hunter* and *Lewis A. Sigler.*

Orlando J. Antonsanti argued the cause for the Porto Rican American Sugar Refinery, Inc., petitioner in No. 30 and respondent in No. 27. With him on the brief were *Arthur L. Quinn* and *Gordon Pickett Peyton.*

José Trías Monge, Assistant Attorney General, and *Walton Hamilton* argued the cause for Puerto Rico, petitioner in No. 32 and respondent in No. 27. With them on the brief were *Vicente Geigel Polanco,* Attorney General, and *Thurman Arnold.*

Frederic P. Lee argued the cause for the Central Roig Refining Co. et al., respondents. With him on the brief was *Noel T. Dowling.*

Donald R. Richberg argued the cause and filed a brief for the American Sugar Refining Co. et al., respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These three cases bring before us the validity of an order of the Secretary of Agriculture, issued by him on the basis of the Sugar Act of 1948. It is claimed that the Secretary disobeyed the requirements of that Act. If it be found that the Secretary brought himself within the Act, the power of Congress to give him the authority he exercised is challenged. By a series of enactments Congress addressed itself to what it found to be serious evils

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resulting from an uncontrolled sugar market. The central aim of this legislation was to rationalize the mischievous fluctuations of a free sugar market by the familiar device of a quota system. The Jones-Costigan Act of 1934, 48 Stat. 670, the Sugar Act of 1937, 50 Stat. 903, and the Sugar Act of 1948, 61 Stat. 922, 7 U. S. C. (Supp. II, 1949) §§ 1100–60.

The volume of sugar moving to the continental United States market was controlled to secure a harmonious relation between supply and demand.[1] To adapt means to the purpose of the sugar legislation, the Act of 1948 defines five domestic sugar-producing areas: two in the continental United States and one each in Hawaii, Puerto Rico and the Virgin Islands. To each area is allotted an annual quota of sugar, specifying the maximum number of tons which may be marketed on the mainland from that area. § 202 (a). A quota is likewise assigned to the Philippines. § 202 (b). The balance of the needs of consumers in the continental United States, to be determined each year by the Secretary, § 201, is met by importation from foreign countries, predominantly from Cuba, of the requisite amount of sugar. § 202 (c).

The quotas thus established apply to sugar in any form, raw or refined. In addition, § 207 of the Act establishes fixed limits on the tonnage of "direct-consumption" or refined sugar[2] which may be marketed annually on the mainland from the offshore areas as part of their total

[1] In the course of this opinion all expressions of an economic character are to be attributed to those who have authority to make such economic judgments—the Congress and the Secretary of Agriculture—and are not to be deemed the independent judgments of the Court. It is not our right to pronounce economic views; we are confined to passing on the right of the Congress and the Secretary to act on the basis of entertainable economic judgments.

[2] With minor exceptions not relevant here, the term "direct-consumption" sugar in the Act refers to refined sugar.

sugar quotas. But mainland refiners are not subject to quota limitations upon the marketing of refined sugar.

The Puerto Rican quota for "direct-consumption" sugar is 126,033 tons. This figure had its genesis in the Jones-Costigan Act of 1934, which provided that the quota for each offshore area was to be the largest amount shipped to the mainland in any one of the three preceding years. 48 Stat. 670, 672–73. In the case of Puerto Rico this was computed by the Secretary at 126,033 tons. General Sugar Quota Regulations, Ser. 2, Rev. 1, p. 4, August 17, 1935. By the Sugar Acts of 1937 and 1948, Congress embedded this amount in legislation. All the details for the control of a commodity like sugar could not, of course, be legislatively predetermined. Administrative powers are an essential part of such a regulatory scheme. The powers conferred by § 205 (a) upon the Secretary of Agriculture raise some of the serious issues in this litigation. By that section Congress authorized the Secretary to allot the refined sugar quota as well as the inclusive allowance of a particular area among those marketing the sugar on the mainland from that area.[3] The section provides that "Allotments shall be

[3] The full text of § 205 (a) is as follows:

"Whenever the Secretary finds that the allotment of any quota, or proration thereof, established for any area pursuant to the provisions of this Act, is necessary to assure an orderly and adequate flow of sugar or liquid sugar in the channels of interstate or foreign commerce, or to prevent disorderly marketing or importation of sugar or liquid sugar, or to maintain a continuous and stable supply of sugar or liquid sugar, or to afford all interested persons an equitable opportunity to market sugar or liquid sugar within any area's quota, after such hearing and upon such notice as he may by regulations prescribe, he shall make allotments of such quota or proration thereof by allotting to persons who market or import sugar or liquid sugar, for such periods as he may designate, the quantities of sugar or liquid sugar which each such person may market in continental United States, the Territory of Hawaii, or Puerto Rico, or may import or bring into continental United States,

made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration" three factors: (1) "processings of sugar . . . to which proportionate shares . . . pertained";[4] (2) past marketings; and (3) ability to market the amount allotted.

On January 21, 1948, the Secretary issued Puerto Rico Sugar Order No. 18, 13 Fed. Reg. 310, allotting the 1948 Puerto Rican refined sugar quota among the various refineries of the island. Having satisfied himself of the need for an allotment, the Secretary, in conformity with the procedural requirements of § 205 (a), apportioned the quota among the individual refiners, setting forth in appropriate findings the manner in which he applied the three statutory standards for allotment.

As to "past marketings" he found that the proper measure was the average of the highest five years of marketings during the seven-year period of 1935–1941. While

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for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him. The Secretary may also, upon such hearing and notice as he may by regulations prescribe, revise or amend any such allotment upon the same basis as the initial allotment was made." 61 Stat. 926, 7 U. S. C. § 1115.

[4] To help effectuate the marketing controls, § 301 of the Act provides that certain payments will be made to farmers only if they limit the marketing of sugar cane or beets grown on their farms to a "proportionate share" of the quantity necessary to fill the area's quota, plus a normal carry-over. The relevance of this provision here is that processings of sugar grown within the "proportionate share" restriction are one of the three factors to be considered by the Secretary in the making of allotments under § 205 (a).

recognizing that ordinarily the most recent period of marketings furnished the appropriate data, he concluded that the period 1942–1947 was unrepresentative in that the war needs made those years abnormal and not a fair basis for purposes of the economic stabilization which was the aim of the 1948 Act. Shortages as to transportation, storage and materials, caused by the war, led to special government control. These circumstances resulted in hardships or advantages in varying degrees to different refiners, quite unrelated to a fair system of quotas for the post-war period.

Likewise as to "the ability . . . to market," the Secretary recognized that marketings during a recent period ordinarily furnished the best measure. But again he found that the derangements of the war years served to make that measure abnormal. He therefore concluded that a fairer guide to his judgment came from the highest marketings of any year during the 1935–1947 period, using, however, present plant capacity as a corrective.

The Secretary duly considered "the processings of sugar" to which proportionate shares pertained, but concluded that this factor could not fairly be applied. This was so because it referred to processings of raw sugar from sugar cane, whereas the three largest Puerto Rican refining concerns restricted themselves to refining raw sugar after it had already been processed. He felt bound, therefore, to give no weight to this factor in the sum he finally struck, and gave equal weight to past marketings and ability to market.

Availing themselves of § 205 (b), respondents, Central Roig Refining Company and Western Sugar Refining Company, two of the three largest refiners in Puerto Rico, appealed from the Secretary's order to the Court of Appeals for the District of Columbia. They charged the Secretary with disregard of the standards which Congress imposed by § 205 (a) for his guidance in making

allotment of quotas; they challenged the validity of the Act itself under the Due Process Clause of the Fifth Amendment. Porto Rican American Sugar Refinery, Inc., petitioner in No. 30, the largest of the Puerto Rican refiners, intervened to defend the Secretary's order against the statutory attack. The Government of Puerto Rico, petitioner in No. 32, intervened to urge the unconstitutionality of the statute, while the American Sugar Refining Company and other mainland refiners intervened to meet this attack. Being of opinion that the Secretary's order was not authorized by the Act, the Court of Appeals reversed it. 84 U. S. App. D. C. 161, 171 F. 2d 1016. Since the order failed on statutory grounds, a majority of that court did not deem it proper to decide the constitutional question. Because of the obvious importance of the decision below in the administration of the Sugar Act we granted certiorari. 336 U. S. 959.

I. In making quota allotments the Secretary of Agriculture must of course keep scrupulously within the limits set by the Sugar Act of 1948. In devising the framework of control Congress fixed the flat quotas for the sugar-producing areas. Congress could not itself, as a practical matter, allot the area quotas among individual marketers. The details on which fair judgment must be based are too shifting and judgment upon them calls for too specialized understanding to make direct congressional determination feasible. Almost inescapably the function of allotting the area quotas among individual marketers becomes an administrative function entrusted to the member of the Cabinet charged with oversight of the agricultural economy of the nation. He could not be left at large and yet he could not be rigidly bounded. Either extreme would defeat the control system. They could be avoided only by laying down standards of such breadth as inevitably to give the Secretary leeway for his expert judgment. Its exercise presumes

a judgment at once comprehensive and conscientious. Accordingly, Congress instructed the Secretary to make allotments "in such manner and in such amounts as to provide a fair, efficient, and equitable distribution" of the quota.

In short, Congress gave the Secretary discretion commensurate with the legislative goal. Allocation of quotas to individual marketers was deemed an essential part of the regulatory scheme. The complexity of problems affecting raw and refined sugar in widely separated and economically disparate areas, accentuated by the instability of the differentiating factors, must have persuaded Congress of the need for continuous detailed administrative supervision.[5] In any event, such is the plain purport of the legislation.

By way of guiding the Secretary in formulating a fair distribution of individual allotments, Congress directed him to exercise his discretion "by taking into consideration" three factors: past marketings, ability to market, and processings to which proportionate shares pertained. Plainly these are not mechanical or self-defining standards. They in turn imply wide areas of judgment and therefore of discretion. The fact that the Secretary's judgment is finally expressed arithmetically gives an illusory definiteness to the process of reaching it. Moreover, he is under a duty merely to take "into

[5] With respect to the Secretary's comparable function of fixing proportionate shares for farms under § 302 of the Act, the House Committee on Agriculture stated: "In view of the differences in conditions of production obtaining in the various sugar-producing areas, the committee has not attempted to specify the exact manner in which the Secretary shall use production history. It is the judgment of the committee that considerable discretion should be left to the Secretary to deal with the varied and changing conditions in the various producing areas, in order to establish fair and equitable proportionate shares for farms in such areas." H. R. Rep. No. 796, 80th Cong., 1st Sess. 8.

consideration" the particularized factors. The Secretary cannot be heedless of these factors in the sense, for instance, of refusing to hear relevant evidence bearing on them. But Congress did not think it was feasible to bind the Secretary as to the part his "consideration" of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation.

It was evidently deemed fair that in a controlled market each producer should be permitted to retain more or less the share of the market which he had acquired in the past. Accordingly, past marketings were to be taken into consideration in the Secretary's allotments. But the past is relevant only if it furnishes a representative index of the relative positions of different marketers. And there is no calculus available for determining whether a base period for measurement is fairly representative. Whether conditions have been so unusual as to make a period unrepresentative is not a matter of counting figures but of weighing imponderables. If he is to exercise the function of allotting a limited supply among avid contenders for it, the Secretary cannot escape the necessity of passing judgment on their relative competitive positions. For Congress announced that one of the main purposes justifying the making of allotments is "to afford all interested persons an equitable opportunity to market sugar." § 205 (a).

In directing the Secretary to take into consideration ability to market, Congress in effect charged the Secretary with making a forecast of the marketers' capacity to perform in the immediate future. Such a forecast no doubt draws heavily on experience, but history never quite repeats itself even in the vicissitudes of industry. Whether ability to market is most rationally measured by plant capacity or by past performance, whether, if the latter,

the base period should be a year and what year or a group of years and what group—these are not questions to be dealt with as statistical problems. They require a disinterested, informed judgment based on circumstances themselves difficult of prophetic interpretation.

The proper mode of ascertaining "processings of sugar . . . to which proportionate shares . . . pertained" is not here in controversy. Perhaps this factor too implies choice. But the question common to all three standards is whether the Secretary may conclude, after due consideration, that in the particular situation before him it is not essential that each of the three factors be quantitatively reflected in the final allotment formula. Concededly, § 205 (a) empowers the Secretary to attribute different influences to the three factors. Obviously one factor may be more influential than another in the sense of furnishing a better means of achieving a "fair, efficient, and equitable distribution." But it is not consonant with reason to authorize the Secretary to find in the context of the situation before him that a criterion has little value and is entitled to no more than nominal weight, but to find it unreasonable for him to conclude that this factor has no significance and therefore should not be at all reflected quantitatively.

Congress did not predetermine the periods of time to which the standards should be related or the respective weights to be accorded them. In this respect the sugar-quota scheme differs from the quotas designed by Congress for tobacco, wheat, cotton and rice, respectively. See §§ 313 (a), 334 (a), 344 (a) and 353 (a) of the Agricultural Adjustment Act of 1938, 52 Stat. 47, 53, 57, 61, as amended, 7 U. S. C. §§ 1313 (a), 1334 (a), 1344 (a), 1353 (a). Nor do the bare words of § 205 (a) confine the Secretary in the responsible exercise of discretion beyond the limitation inherent upon such delegated authority. He is not free to be capricious, to act without reason, that

is, in relation to the attainment of the objects declared by § 205 (a). The very standards for his conduct, the attainment of "fair, efficient, and equitable distribution" preclude abstract or doctrinaire categories. A variety of plans of allotment may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice.

These considerations dispose of this phase of the case. We would have to replace the Secretary's judgment with our own to hold that on the record before us he acted arbitrarily in reaching the conviction that the years 1935–1941 furnished a fairer measure of past marketings than the war years 1942–1947. Nor can we hold that it was baseless for him to decide that increased marketings during the war years may be taken to mean improved ability to market but decreased marketings do not justify the opposite conclusion. And it was within his province to exclude from his determination the processings of sugar to which proportionate shares pertained. It is not for us to reject the balance he struck on consideration of all the factors unless we can say that his judgment is not one that a fair-minded tribunal with specialized knowledge could have reached. This we cannot say. We conclude, therefore, that in issuing Order No. 18 the Secretary did not exceed the authority given him by Congress.

II. We must therefore face the challenge to the constitutionality of the Act of 1948. This objection to the order in support of their judgment below is clearly open to respondents in Nos. 27 and 30. The Government of Puerto Rico likewise challenges the constitutionality of the Act. But its status in this litigation raises a distinct issue, consideration of which will be postponed for the moment.

The sugar problem of the country is an old and obstinate one. For fourteen years Congress grappled with it through the mechanism of quotas. Three enactments, culminating in the Sugar Act of 1948, represented an effort to deal with what were deemed to be the harmful effects on interstate and foreign commerce of progressively depressed sugar prices of earlier years created by world surpluses, or, if one prefers it, by the conditions that reflected the imbalance between production and consumption.[6] The legislation presupposes a finding by Congress that producers and marketers of sugar could not adequately respond to market changes merely through the mechanism of a free market and that the public interest, insofar as the Commerce Clause may be drawn upon to meet it, needed controls to supplement and replace the haggling of the market.

Congress might of course have limited its intervention to the raw sugar market, trusting that thereby stability in the refined sugar market would be produced. Congress thought otherwise; it evidently felt that competition among refiners for a legally limited supply of raw sugar, in a period of overexpanded refining capacity,[7] ought not to be left at large. In any event, Congress had the constitutional right to think otherwise and to bring the refining of sugar within its regulatory scheme.

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[6] The average price per pound of duty-paid raw sugar gradually declined from 6.98 cents in 1923 to 2.80 cents in early 1932. United States Tariff Comm'n, Report to the President on Sugar, Report No. 73, 2d Ser., p. 46. See also Dalton, Sugar, A Case Study of Government Control, cc. IV, V, especially p. 41; 16 Dept. State Bull. 44.

[7] It was estimated that the mainland refineries alone had a capacity in excess of demand of from one-third to one-half. See United States Tariff Comm'n, Report to the President on Sugar, Report No. 73, 2d Ser., p. 91; cf. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 574.

See *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533; *Wickard* v. *Filburn,* 317 U. S. 111.

It is a commonplace that reforms may bring in their train new difficulties. In any scheme of reform, their prevention or mitigation becomes a proper legislative concern. While ameliorating the effect of disorderly competition, market controls generate problems of their own, not encountered under a competitive system. Such new problems are not outside the comprehensive scope of the great Commerce Clause. Nor does the Commerce Clause impose requirements of geographic uniformity. (Compare Art. I, § 8, cl. 1 and cl. 4.) Congress may devise, as it has done in the Sugar Act of 1948, a national policy with due regard for the varying and fluctuating interests of different regions. See *e. g., Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334; *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408. And since the Act of 1948 does not even remotely impinge on any of the specific limitations upon the Commerce Clause (Art. I, § 9, cl. 5 and cl. 6), we are not concerned with the vexing problem of the applicability of these clauses to Puerto Rico. Compare *Downes* v. *Bidwell,* 182 U. S. 244; *Dooley* v. *United States,* 183 U. S. 151; *Alaska* v. *Troy,* 258 U. S. 101; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 670, n. 5.

However, not even resort to the Commerce Clause can defy the standards of due process. We assume that these standards extend to regulations of commerce that enmesh Puerto Rico. See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 148–51; *United States* v. *Darby,* 312 U. S. 100, 125–26; *Balzac* v. *Porto Rico,* 258 U. S. 298, 313. The Sugar Act of 1948 is claimed to offend the Due Process Clause of the Fifth Amendment because of the alleged discriminatory character and the oppressive

effects of the refined sugar quota established by the Act. If ever claims of this sort carried plausibility, they seem to us singularly belated in view of the unfolding of the Commerce Clause.

The use of quotas on refined sugar, legislatively apportioned to different geographic areas and administratively allocated to individual beneficiaries, is a device based on the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U. S. C. § 1281 *et seq.*, and sanctioned by this Court in *Mulford* v. *Smith, supra.* The problem which confronted Congress was not the setting of quotas abstractly considered but so to fix their amount as to achieve approximate justice in the shares allotted to each area and the persons within it. To recognize the problem is to acknowledge its perplexities.

Congress was thus confronted with the formulation of policy peculiarly within its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses. To fix quotas on a strict historical basis is hard on latecomers into the industry or on those in it who desire to expand. On the other hand, to the extent that newcomers are allowed to enter or old-timers to expand there must either be an increase in supply or a reduction in the quotas of others. Many other factors must plague those charged with the formulation of policy—the extent to which projected expansion is a function of efficiency or becomes a depressant of wage standards; the wise direction of capital into investments and the economic waste incident to what may be on the short or the long pull overexpansion of industrial facilities; the availability of a more suitable basis for the fixing of quotas, etc., etc. The final judgment is too apt to be a hodge-podge of considerations, including considerations

that may well weigh with legislators but which this Court can hardly disentangle.

Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons. This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation. See *Wickard* v. *Filburn, supra* at 129.

Congress, it is insisted, has not established refined sugar quotas for the mainland refiners as it has for the offshore areas. Whatever inequalities may thereby be created, this is not the forum for their correction for the all-sufficient reason that the extent and nature of inequalities are themselves controversial matters hardly meet for judicial solution. Thus, while the mainland refiners are legally free to purchase and refine all sugar within the raw sugar quota and Puerto Rican refiners are limited to their shares of the refined sugar quota, Congress apparently thought that Puerto Rican refiners operated at costs sufficiently low to insulate them from mainland competition. In addition, it is claimed that since the total supply of raw sugar permitted to enter the mainland market is limited the mainland refiners are in effect also subject to the refined sugar quota, although in contrast to the unchanging quotas of the territories the mainland quota will vary with changes in the total consumer demand. Because this demand tends to be stable, however, the mainland refiners' share of the refined sugar has not, it is urged, greatly expanded during the years when quotas were in effect. Congress might well have thought that relatively minor contractions and expansions in supply from year to year should thus be absorbed.

Plainly it is not the business of judges to sit in judgment on the validity or the significance of such views. The Act may impose hardships here and there; the incidence of hardship may shift in location and intensity. It is not for us to have views on the merits of this legislation. It suffices that we cannot say, as we cannot, that there is "discrimination of such an injurious character as to bring into operation the due process clause." *Currin* v. *Wallace,* 306 U. S. 1, 14. Expressions of dissatisfaction by the Executive and in some quarters of Congress that the refined sugar quotas were "arbitrary," "discriminatory," and "unfair" may reflect greater wisdom or greater fairness than the collective wisdom of Congress which put this Act on the statute books. But the issue was thrashed out in Congress; Congress is the place for its reconsideration.

III. There remains Puerto Rico's right to participate in this litigation. Puerto Rico can have no better standing to challenge the constitutionality of the Sugar Act of 1948 than if it were a full-fledged State. The right of a State to press such a claim raises familiar difficulties. Compare *Massachusetts* v. *Mellon,* 262 U. S. 447; *Florida* v. *Mellon,* 273 U. S. 12; *Jones ex rel. Louisiana* v. *Bowles,* 322 U. S. 707, with *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230; *New York* v. *New Jersey,* 256 U. S. 296; *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439. Whatever rights Puerto Rico has as a polity, see *Porto Rico* v. *Rosaly,* 227 U. S. 270; *Puerto Rico* v. *Shell Co.,* 302 U. S. 253; *Puerto Rico* v. *Rubert Hermanos, Inc.,* 309 U. S. 543, the Island is not a State. Additional legal questions are raised whether Puerto Rico can press the interests that it is here pressing. In view of the conclusion that we have reached on the constitutional issues which had to be met apart from any jurisdictional question, it would entail an empty discussion to decide whether Puerto Rico

has a standing as a party in this case. It would in effect be merely an advisory opinion on a delicate subject. Since the real issues raised by Puerto Rico have already been decided in Nos. 27 and 30, it becomes unnecessary to decide the question of Puerto Rico's standing to sue. *Wickard* v. *Filburn, supra* at 114, n. 3.

Nos. 27 and 30 reversed.
No. 32 dismissed.

MR. JUSTICE BLACK would affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit for the reasons given in that court's opinion. 84 U. S. App. D. C. 161, 171 F. 2d 1016.

MR. JUSTICE DOUGLAS took no part in the consideration or disposition of these cases.

CHAPMAN, SECRETARY OF THE INTERIOR, *v.* SHERIDAN-WYOMING COAL CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 60. Argued January 9, 1950.—Decided February 6, 1950.

1. Under the Mineral Lands Leasing Act, the Secretary of the Interior leased coal-mining rights in certain public lands to one lessee and now proposes to lease similar rights in other public lands to a competitor operating coal mines on state lands which are nearing exhaustion. The first lessee sued to enjoin the proposed lease to its competitor. Its lease contained no express covenant not to lease other lands to competitors; but a regulation of the Secretary directs that leases be recommended "only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." It is assumed that no such showing has been or can be made in this case. *Held:* The complaint stated no cause of action. The proposed lease does not breach any contract right or invade any property right of plaintiff and does not violate any law, but is within the discretionary power of the Secretary. Pp. 622–631.

   (a) The complaint does not show a cause of action to enforce a restrictive covenant or property right against leasing other public lands as authorized by the statute. Pp. 625–629.

   (b) Assuming that the regulation fixes a controlling policy, the Secretary's interpretation of it as not applying to a lease to keep an existing coal mine in operation, is a permissible interpretation which will not be disturbed by the courts. Pp. 629–631.

2. The Mineral Lands Leasing Act does not authorize anyone to grant or to obtain exclusive rights of access to coal resources in public lands but seems to contemplate the opening of the public domain to competitive exploitation. Pp. 628–629.

84 U. S. App. D. C. 288, 172 F. 2d 282, reversed.

The proceedings below are stated concisely in the first paragraph of the opinion. Chapman was substituted for Krug as the party petitioner. 338 U. S. 898. The judgment of this Court is reported at p. 631.

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Roger P. Marquis argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Vanech, Wilma C. Martin* and *John C. Harrington.*

T. Peter Ansberry argued the cause for respondent. With him on the brief were *Stephen J. McMahon, Jr.* and *Seth W. Richardson.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This action by a lessee of coal-mining rights in public lands seeks to prevent leasing of similar rights in other lands to a competitor. The case is before us only on pleadings. The original complaint was dismissed by the District Court on several grounds but the Court of Appeals affirmed only on the ground that the complaint showed no standing to sue, there being no allegation of special injury to any property right of plaintiff. *Sheridan-Wyoming Coal Co.* v. *Krug,* 83 U. S. App. D. C. 162, 168 F. 2d 557. It gave leave to apply to the District Court to amend in this respect. The District Court denied the privilege, however, holding that the proposed new matter added nothing material, and that amendment would be idle and needlessly prolong the litigation. This, we think, was equivalent in effect to sustaining a demurrer to the amended complaint and requires us to treat well-pleaded facts as true. On this basis, the Court of Appeals reversed and, in substance, held that the amended complaint does state a cause of action. 84 U. S. App. D. C. 288, 172 F. 2d 282. We granted certiorari. 338 U. S. 810.

The hypothesis on which the legal issues are to be decided is this:

At all relevant times the following regulation, promulgated by the Secretary of the Interior, has been in effect:

> "*Showing required that an additional coal mine is needed.* The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." 43 CFR 1938, § 193.3.

It originated in 1934, when the coal industry was demoralized by excess production capacity described in opinions of this Court. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 361; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, opinion of Cardozo, J., 324, 330; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 395. The policy which the Department embodied in this regulation, and to which it has since adhered, was stated in letters of the Secretary set forth in the margin.[1]

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[1] "EXHIBIT 'A'

"EXCERPT FROM LETTER OF JANUARY 24, 1934, FROM THE SECRETARY OF THE INTERIOR TO THE DIRECTOR OF THE BUREAU OF GEOLOGICAL SURVEY.

"The question of the advisability of withholding new leases of coal lands of the United States has been presented to me.

"It is clear from the language of section 2 of the leasing act of February 25, 1920 (41 Stat. 437), and from the interpretation given to Section 13 of that act, relating to oil and gas, by the Supreme Court in the case of *United States* v. *Wilbur,* 283 U. S. 414, that it is within the discretionary authority of the Secretary of the Interior whether he shall issue any coal leases and coal prospecting permits. In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

"Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the operation of the leasing act as to new coal leases and prospecting permits. It is believed that substantially the

In September, 1943, the Sheridan-Wyoming Coal Company leased additional lands located in Wyoming for coal-mining purposes from the Government and, "in reliance upon the Regulation," has expended large sums in development and built up a prosperous business in the rather low-grade coal mined and largely consumed in that region.

In December, 1943, the Big Horn Company applied for a lease of nearby lands for production of competitive coal, and in 1945 applied for additional lands. Meanwhile Big Horn already had established mines on partially exhausted state-owned lands and desired the federal lands to prolong its business. The Sheridan-Wyoming Company, among others, protested on the basis of the regulation. The protest, after hearings, was overruled and,

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same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need for coal which cannot otherwise be reasonably purchased or obtained is shown. . . .

"Hereafter the offering of coal lands for lease by competitive bidding or the granting of prospecting permits should not be recommended unless you have reliable information that there is an actual need for coal which cannot otherwise be reasonably met."

"EXHIBIT 'B'

"EXCERPT FROM LETTER OF JANUARY 24, 1934, FROM THE SECRETARY OF THE INTERIOR TO THE COMMISSIONER OF THE GENERAL LAND OFFICE.

"In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

"Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need is shown for coal which cannot otherwise be reasonably purchased or obtained. . . .

"It is advisable that you in the first instance require lease applicants to show fully the need for additional production of coal."

unless prevented, the Secretary will lease to Big Horn. The Secretary has made no finding that there is need for any additional supply of coal and, in fact, there is no such need. If he leases to Big Horn, the two companies will have capacity to produce in excess of the demand for that grade of coal in the limited market. The investment of Sheridan-Wyoming will be substantially impaired and its volume of sales decreased and profitable markets lost. About these three ultimate facts—the regulation, the lease and the threatened lease to a competitor—the parties have argued several intricate and interesting questions as to the standing of the plaintiff to sue, whether the suit really is one against the United States without sovereign consent and whether the Secretary has abused his power in entertaining the application of Big Horn. These questions we do not need to discuss because of the view we take of more fundamental aspects of the case. We think the facts give rise to no cause of action, because the proposed lease does not breach any contract right or invade any property right of plaintiff and does not violate any law. Hence, the leasing is within the discretionary power of the Secretary and courts will not review its exercise.

I. Contract Rights.

The court below has sustained the complaint for the principal reason that a lease to Big Horn would breach the lease to plaintiff and that plaintiff has a property right to have the lands involved withheld from lease.

It is only on this basis of its property rights, created by contract, that plaintiff has been held to have standing to sue; for, if it has such rights, the court below truly said, "The prevention of a breach of a restrictive provision in a contract is one of equity's most usual functions." Credited with "the status of one claiming a property right by contract, threatened with invasion," the plaintiff has been termed by the Court of Appeals "possessor of

a valuable right, created by contract in the presence of valid and binding restrictive regulations."

Of course, no express covenant of plaintiff's lease restricts the Secretary from leasing other lands to other applicants. The restrictive covenant is sought to be supplied by implication. The lease, it is reasoned, was expressly made subject to the Mineral Lands Leasing Act, 41 Stat. 437, as amended, 30 U. S. C. §§ 181 *et seq.*; the lease constructively includes the statute; the regulation which was not referred to in the lease nevertheless had the force and sanction of statute; hence, the restrictive regulation was a covenant of the lease. It is said the threatened lease would violate the regulation. For the purpose of testing the contract-right theory, we shall assume that it does so.

What is the contract property right assumed? It is a right to nondevelopment of coal reserves in an indeterminate but substantial part of the public domain for benefit of its own lease. It is not a right necessary to the fullest physical development and enjoyment of all the lands plaintiff acquired for itself, and is one not normally appurtenant to real estate. The assumed covenant is purely negative in character and its whole burden is upon other premises owned by the United States in which the plaintiff has no other interest. They are premises, moreover, in which it is doubtful whether plaintiff could lawfully acquire any other interest in view of the limited areas which the statute allows to one lessee. By the assumed covenant, alienation and utilization of public lands in the manner authorized by Congress is restricted. This is for an unstated and indeterminable period. And it is accomplished not by a covenant expressed in the lease itself, but by one read into it from the regulations.

A competent grantor by appropriate covenants could, of course, convey the right claimed here, and equity would enforce it. But when a right "consists in restraining the

owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done," it is an easement, sometimes called a negative easement, or an amenity. *Trustees* v. *Lynch,* 70 N. Y. 440, 447. "An equitable restriction," which prevents development of property by building on it, has been said to be "an easement, or servitude in the nature of an easement," a "right in the nature of an easement," and an "interest in a contractual stipulation which is made for their common benefit." Such "equitable restrictions" are real estate, part and parcel of the land to which they are attached and pass by conveyance. *Riverbank Improvement Co.* v. *Chadwick,* 228 Mass. 242, 246, 117 N. E. 244, 245. A contractual restriction which limits the use one may make of his own lands in favor of another and his lands is "sometimes called a negative easement, which is the right in the owner of the dominant tenement to restrict the owner of the servient tenement in the exercise of general and natural rights of property." It is an interest in lands which can pass only by deed and is in every legal sense an incumbrance. *Uihlein* v. *Matthews,* 172 N. Y. 154, 158, 64 N. E. 792, 793.

But whatever we might determine to be the technical nature of the collateral property right claimed to result from Sheridan's lease, to any extent that it added a property right to the plaintiff's lands it created an incumbrance or subtraction from the aggregate of rights in the United States. Courts would not lightly imply against any land owner a covenant which would restrict alienation or enjoyment of his estate. There are even stronger reasons against implied covenants imposing easements, servitudes, amenities or restrictions upon the public lands.

The Mineral Lands Leasing Acts confer broad powers on the Secretary as leasing agent for the Government. We find nothing that expressly prevents him from taking into consideration whether a public interest will be served or

injured by opening a particular mine. But we find no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases.

The leasing Acts strictly limit the area which any one lessee may acquire, either directly or indirectly. 30 U. S. C. § 184. But if, in taking up a permitted allotment of public lands, one may acquire a right that other areas far more extensive must lie fallow and unused for the benefit of his lands, he is acquiring an interest in prohibited lands and an interest that may be worth many times that interest which the statute allows him. And it is acquired without additional purchase price, rental, or royalty.

Moreover, it is not denied that the effect of sustaining plaintiff's suit would be to create a monopoly. Of course, it is a little one, limited to low-grade coal and to an advantageous shipping zone. Big Horn, if it gets no lease, must eventually go out of business, leaving its customers to Sheridan. And the United States could not for some period—we do not know how long—admit any other competitor to the field, unless it can be shown that Sheridan's supply is not equal to the market. It may, however, continue to acquire additional reserves as its own approach exhaustion. The whole claim of damage here is that competition from Big Horn will impair this snug little monopoly of the market to which plaintiff thinks it has acquired a property right.

But the policy of the leasing statute looks the other way. Besides limiting the leasehold of any one lessee, it prevents mineral rights, on pain of forfeiture, from passing into the hands of any unlawful trust or becoming the subject of any contract or conspiracy in restraint of trade. 30 U. S. C. § 184. Its whole policy seems to contemplate the opening of the public domain to competitive exploitation. It nowhere authorizes anyone to grant or to obtain

exclusive rights of access to these coal resources. What lessees can acquire from the Government is a supply of coal, not an exclusive market. We do not say that the Secretary may not withhold, or by regulation provide for withholding, lands from lease because the public interest would be injured, through impairing private business, from excess production capacity. But we find no authority to freeze this public interest into an irrevocable private property right.

The allegations of the amended complaint therefore do not show a cause of action to enforce a restrictive covenant or property right against leasing other public lands as authorized by statute.

II. Violation of Law or Regulation.

Since the District Court was overruled by the Court of Appeals only because of the latter's property rights theory and since the complaint without these allegations had earlier been held insufficient, it may be questioned whether other grounds to sustain the judgment below can be availed of. But even if the allegations fail to show a property right that equity will protect, they might be sufficient to show a special injury or interest, such as would enable plaintiff to raise the question of violation of law or regulation in the proposed leasing. To end a litigation already pending too long, we assume, without deciding, that plaintiff may raise this issue which we now consider.

The only claim of law violation is that the Secretary is proposing to violate his own regulation, promulgated pursuant to the Act and hence having the force of law. That it binds him as well as others while it is in effect is not doubted.

The regulation on literal reading does not purport to prohibit the Secretary from any leasing unless need for new mines be shown. It does direct the General Land

Office (now the Bureau of Land Management) to find need for additional capacity before recommending new leasing. Its recommendation, however, is only advisory and can be overruled or disregarded. On its face, therefore, the regulation would seem to be directed primarily to a procedural matter within the Department of the Interior. However, it is claimed that the letters of Secretary Ickes at the time it was adopted and the uniform practice since, show it to have been a regulation fixing a controlling policy. We proceed on that assumption.

In the case before us the Secretary neither repudiates the regulation nor stands upon any right to depart from it. He says that, properly construed, it does not apply to the proposed Big Horn lease. It only prevents a lease which will introduce a new competitor to the field and not, he says, a lease which would only enable an existing mine and an established business to continue. Sheridan argues that this reasoning sanctions an evasion of the regulation in that Big Horn opened its mine on partially depleted state lands knowing it must get federal lands also or quit. The implication is that state lands were used as a sort of portal in which to stand while prying a federal lease out from under the regulation. Plaintiff insists that the Secretary is required to act in the light of conditions when Big Horn first applied, and not as of now when it has built up a going business on the inadequate state leases, aided by war conditions.

But the action is one in equity, and "equity will administer such relief as the exigencies of the case demand at the close of the trial." *Bloomquist* v. *Farson,* 222 N. Y. 375, 380, 118 N. E. 855, 856; *Lightfoot* v. *Davis,* 198 N. Y. 261, 273, 91 N. E. 582, 586. The question on injunction is whether the action threatened will be a violation if it now takes place in light of conditions shown by the proposed amended complaint. That pleads findings of the Department which show what has hap-

pened since the Big Horn application was filed. Without recourse to federal lands, it has established a mine and a business in the face of Sheridan competition. If time has improved Big Horn's position in this respect, it must be noted that the delay in acting on its application has been largely due to plaintiff's protests and litigations.

We think a court of equity cannot term unreasonable the view of the Secretary that Big Horn's lease is not for "an additional coal mine," need for which must be proved. It does not use federal reserves to add a new competitor to the market. It uses them to keep one there. We think the distinction is substantial and the Secretary's interpretation of the regulation is permissible, even if not inevitable. The declining market following the war and the growing use of oil may present difficult problems of survival for government lessees and of fair dealing for the Secretary. But courts can intervene only where legal rights are invaded or the law violated.

We think the District Court rightly concluded that the amended complaint fails to state a legal case for the relief asked. Accordingly, the judgment below is

Reversed.

Mr. Justice Douglas took no part in the consideration or decision of this case.

UNITED STATES *v.* MORTON SALT CO.

NO. 273. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued December 14, 1949.—Decided February 6, 1950.

Under § 5 of the Federal Trade Commission Act, the Commission ordered respondent corporations and others to cease and desist from certain trade practices. The Court of Appeals affirmed the order with modifications and commanded compliance. The decree directed that reports of compliance be filed with the Commission within 90 days, reserved jurisdiction to enter further orders to enforce compliance, and provided that it was without prejudice to the right of the Government to prosecute suits to recover civil penalties for violations of the order and to initiate contempt proceedings for violations of the decree. Reports of compliance were filed and accepted. Under § 6 (a) and (b) of the Act and its own Rule of Practice No. XXVI, the Commission subsequently ordered respondents to file special reports to show continuing compliance with the decree. *Held:*

1. This order did not invade the jurisdiction of the Court of Appeals. Pp. 638–643.

(a) The Commission's continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce is not suspended or exhausted as to any violator whose guilt is once established. Pp. 638–639.

(b) Although the Commission's cease and desist order was merged in the court's decree, the court neither assumed to itself nor denied to the Commission that agency's duty to inform itself and to protect commerce against continued or renewed unlawful practice. P. 641.

(c) When investigative and accusatory duties are delegated by statute to an administrative body like the Commission, it may take steps to inform itself as to whether there is probable violation of the law without first making charges that there are such violations. Pp. 641–643.

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*Together with No. 274, *United States* v. *International Salt Co.*, also on certiorari to the same court.

(d) The Commission's order for special reports was not made in the name of the court or in reliance upon judicial powers, but in reliance upon its own law-enforcing powers. P. 643.

2. The order did not violate § 3 (a) of the Administrative Procedure Act. Respondents were put on notice of the possibility of the issuance of such orders by the Commission's Rule XXVI, together with its Statement of Organization, Procedures and Functions, which meet the requirements of that section. Pp. 644–647.

3. The Commission's authority under § 6 of the Act to require special reports of corporations includes special reports of the manner in which they are complying with decrees enforcing cease and desist orders under § 5. Pp. 647–651.

(a) That this use of the Commission's power under § 6 is novel and unprecedented in Commission practice does not require a different result, since power granted to governmental agencies is not forfeited by nonuser. Pp. 647–648.

(b) The language of § 6 is clearly broad enough to authorize the issuance of the order here in question. Pp. 648–649.

(c) The use of information obtained in special reports under § 6 is not limited to support of general economic surveys for the President, the Congress or the Attorney General. It may also be used in determining whether there has been proper compliance with the court's decree under § 5. Pp. 649–650.

(d) The special reports required by the order were of the kind which the Commission is authorized by § 6 to require. P. 650.

(e) The fact that § 5 applies to individuals, partnerships, and corporations, while §§ 6 (b) and 10 apply only to corporations, does not require a different result. Pp. 650–651.

4. The Commission's order does not contravene the Fourth Amendment's proscription of unreasonable searches and seizures or the due process clause of the Fifth Amendment. Pp. 651–654.

(a) Law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest. P. 652.

(b) If the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant, it does not exceed the investigatory power of the Commission. P. 652.

(c) On its face, the Commission's order did not transgress these bounds. Pp. 652–653.

(d) Before the courts will hold an order of the Commission seeking information reports arbitrarily excessive, they may expect

the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions; and petitioners made no such efforts in this case. Pp. 653–654.

(e) This decision is not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of the Act. P. 654.

174 F. 2d 703, reversed.

The District Court dismissed suits by the United States under §§ 9 and 10 of the Federal Trade Commission Act to compel respondents to comply with an order of the Federal Trade Commission requiring them to file special reports, and to recover penalties for noncompliance. 80 F. Supp. 419. The Court of Appeals affirmed. 174 F. 2d 703. This Court granted certiorari. 338 U. S. 857. *Reversed,* p. 654.

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, Curtis C. Shears, J. Roger Wollenberg, W. T. Kelley* and *Joseph S. Wright.*

L. M. McBride argued the cause and filed a brief for respondent in No. 273.

Frederic R. Sanborn argued the cause and filed a brief for respondent in No. 274.

Mr. Justice Jackson delivered the opinion of the Court.

This is a controversy as to the power of the Federal Trade Commission to require corporations to file reports showing how they have complied with a decree of the Court of Appeals enforcing the Commission's cease and desist order, in addition to those reports required by the decree itself.

Proceedings under § 5 of the Federal Trade Commission Act[1] culminated in a Commission order requiring respondents Morton Salt Company and International Salt Company, together with eighteen other salt producers

[1] The Federal Trade Commission was established, under the Federal Trade Commission Act, 38 Stat. 717, as amended 52 Stat. 111, 1028, 15 U. S. C. §§ 41 *et seq.*, to prevent unfair methods of competition and unfair or deceptive acts or practices in interstate commerce by certain persons, partnerships or corporations. Under § 5 (b) of that Act the Commission is empowered and directed, following suitable hearing and determination, to order that those found guilty of such practices cease and desist therefrom; and under §§ 5 (c) and 5 (d) exclusive jurisdiction to affirm, enforce, modify, or set aside such orders is placed in the appropriate Court of Appeals, whose judgment and decree are final except insofar as they may be subject to review here. Civil penalties for violations of cease and desist orders are provided for, § 5 (l), to be recovered in civil actions brought by the United States. Under §§ 6 (a) and 6 (b) of the Act, the Commission is authorized to compile information concerning, and to investigate, the organization, business, conduct, practices, and management of any corporation within its jurisdiction, and to require any such corporation to file "annual or special, or both annual and special, reports or answers in writing to specific questions," concerning such information. For the purposes of the Act, the Commission is empowered, in § 9, to examine and copy documentary evidence of any corporation being investigated or proceeded against, and to require attendance of witnesses and production of all such documentary evidence. The same section also gives District Courts jurisdiction to compel compliance with the subpoena as well as other provisions of the Act or any order of the Commission made in pursuance thereof. And, finally, in § 10, it is provided that, "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture . . . shall be recoverable in a civil suit in the name of the United States . . . ." The present action was brought to compel the filing of reports ordered by the Commission and for money judgment under § 10 for respondents' default to do so.

and a trade association, to cease and desist from stated practices in connection with the pricing, producing and marketing of salt. The Court of Appeals for the Seventh Circuit affirmed the order with modifications and commanded compliance. 134 F. 2d 354. The decree directed that reports of the manner of compliance be filed with the Commission within ninety days, but it reserved jurisdiction "to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The decree expressly was "without prejudice to the right of the United States, as provided in Section 5 (l) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the said modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree." The reports of compliance were subsequently filed and accepted, and there the matter appears to have rested for a little upwards of four years.

On September 2, 1947, the Commission ordered additional and highly particularized reports to show continuing compliance with the decree. This was done without application to the court, was not authorized by any provision of its decree, and is not provided for in § 5 of the statute under which the Commission's original cease and desist order had issued. The new order recited that it was issued on the Commission's own motion pursuant to its published Rule of Practice No. XXVI [2] and the authority granted by subsections (a) and (b) of § 6 of the Trade Commission Act. It ordered these and other parties restrained by the earlier decree to file within thirty days "additional reports showing in detail the

[2] See note 4, *infra*.

manner and form in which they have been, and are now, complying with said modified order to cease and desist and said decree." It demanded of each producer a "complete statement" of the "prices, terms, and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944." From the Salt Producers Association it required information as to its activities and services. The Association and some of the producers reported satisfactorily. These two respondents did not. Instead, each informed the Commission in general terms that it had complied with the decree in the manner previously reported, but that it doubted the Commission's jurisdiction to require further reports and declined to supply the particulars demanded. Neither asked any hearing or made objection to the scope of the order.

The Commission next gave respondents notices asserting their default and calling attention to penalties provided in § 10 of the Act. Neither respondent asked any hearing on the notice of default. These suits were then commenced in the name of the United States in District Court under §§ 9 and 10 of the Trade Commission Act, asking mandatory injunctions commanding respondents to report as directed, together with judgment against each for $100 per day while default continued. Respondents answered. Both sides moved for summary judgments. The court found no dispute as to material facts and dismissed the complaints for want of jurisdiction. 80 F. Supp. 419. The Court of Appeals, by divided vote, affirmed. 174 F. 2d 703. We granted certiorari, 338 U. S. 857, because the case involved issues of some importance to enforcement of the Act and of court decrees under it and under other Acts which provide similar methods to enforce orders of administrative bodies.

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The Government's suits and the Commission's order are challenged upon a variety of grounds, not all of which were considered by the Court of Appeals. They include contentions that (1) the order constitutes an interference with the decree and an invasion of the powers of the Court of Appeals; (2) the Commission's Rule XXVI is *ultra vires* and violates the Federal Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001 *et seq.;* (3) the procedure is unauthorized by those sections of the Act on which it is based; (4) it is novel and arbitrary and violates the Fourth and Fifth Amendments to the Constitution. For reasons given, we reject each of these contentions.

I. Invasion of Court of Appeals Jurisdiction.

The respondents' case and the decision below are rested heavily on this argument that the Commission is invading the province of the judiciary. The Court of Appeals held that the Commission's order of September 2, 1947, represented an unauthorized attempt to enforce that court's decree. It pointed out that the statute had made the court's own jurisdiction of the proceeding "exclusive" and its own decree final. It considered that "every vestige of jurisdiction" over that subject was "firmly and exclusively lodged in [the] Court of Appeals." It noted that it had required filing of only the original compliance reports, and that it had protected its jurisdiction by reserving power to enter further orders necessary to enforce compliance and prevent evasion. It thought that the effect of the Commission's proceedings was to assert "such jurisdiction to reside elsewhere."

It seems conceded, however, that some power or duty, independently of the decree, must still have resided in the Commission.[3] Certainly entry of the court decree did

[3] For example, one of the respondents frankly states: ". . . At no time has this respondent attempted to argue that it was immune to investigation by the Federal Trade Commission simply by virtue

not wholly relieve the Commission of responsibility for its enforcement. The decree recognized that. It left to the Commission the right and hence the responsibility "to initiate contempt proceedings for the violation of this decree." This must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not cause for such a proceeding. The decree also required the original report showing the manner and form of each respondent's compliance to be filed, not with the court but with the Commission. Presumably the Commission was expected to scrutinize it and, if insufficient on its face, to reject it and move the court to take notice of the default. And the duty likewise was left upon the Commission to move the court if any respondent made a false report. The duty would appear to be the same if a temporary compliance were truly reported but conduct resumed which would violate the decree. In addition, the Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility as to all within the coverage of the Act is not suspended or exhausted as to any violator whose guilt is once established.

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of the original case having come within the jurisdiction of the Court of Appeals. This respondent assumes that in some manner or other the Commission can, if it chooses, continue to police the compliance of this respondent by appropriate investigatory procedures. Whether or not the appropriate procedure is (a) by petitioning the Court of Appeals for permission to investigate the respondent with a view to possible contempt or Section 5 (l) proceedings, (b) by an assertion of a right of investigation under Section 9, even though it be an investigation supplemental to a Court of Appeals decree, or (c) by an assertion of an alleged inherent right of investigation under Section 5, is a matter of law not at issue in this case, and it represents an issue as to which this respondent at the moment is completely indifferent. . . ."

If the Commission had petitioned the court itself to order additional reports of compliance, it could properly have been required to present some evidence of probable violation to overcome the "presumption of legality," of innocence, and of obedience to the law which respondents here urge. Courts hesitate to alter or supplement their decrees except the need be proved as well as asserted. Evidence the Commission did not have; it had at most a suspicion, or let us say a curiosity as to whether respondents' reported reformation in business methods was an abiding one.

Must the decree, after a single report of compliance, rest upon respondents' honor unless evidence of a violation fortuitously comes to the Commission? May not the Commission, in view of its residual duty of enforcement, affirmatively satisfy itself that the decree is being observed? Whether this usurps the courts' own function is, we think, answered by consideration of the fundamental relationship between the courts and administrative bodies.

The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process. Its agencies are provided with staffs to institute proceedings and to follow up decrees and police their obedience. While that process at times is adversary, it also at times is inquisitorial. These agencies are expected to ascertain when and against whom proceedings should be set in motion and to take the lead in following through to effective results. It is expected that this combination of duty and power always will result in earnest and eager action but it is feared that it may sometimes result in harsh and overzealous action.

To protect against mistaken or arbitrary orders, judicial review is provided. Its function is dispassionate and disinterested adjudication, unmixed with any concern as

to the success of either prosecution or defense. Courts are not expected to start wheels moving or to follow up judgments. Courts neither have, nor need, sleuths to dig up evidence, staffs to analyze reports, or personnel to prepare prosecutions for contempts. Indeed, while some situations force the judge to pass on contempt issues which he himself raises, it is to be regretted whenever a court in any sense must become prosecutor. Those occasions should not be needlessly multiplied by denying investigative and prosecutive powers to other lawful agencies.

The court in this case advisedly left it to the Commission to receive the report of compliance and to institute any contempt proceedings. This was in harmony with our system. When the process of adjudication is complete, all judgments are handed over to the litigant or executive officers, such as the sheriff or marshal, to execute. Steps which the litigant or executive department lawfully takes for their enforcement are a vindication rather than a usurpation of the court's power. In the case before us, it is true that the Commission's cease and desist order was merged in the court's decree; but the court neither assumed to itself nor denied to the Commission that agency's duty to inform itself and protect commerce against continued or renewed unlawful practice.

This case illustrates the difference between the judicial function and the function the Commission is attempting to perform. The respondents argue that since the Commission made no charge of violation either of the decree or the statute, it is engaged in a mere "fishing expedition" to see if it can turn up evidence of guilt. We will assume for the argument that this is so. Courts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined

to these ends. The judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, such as those against self-incrimination, unreasonable search and seizure, and due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan "no fishing expeditions." It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than those which underlay many older decisions. Compare *Jones* v. *Securities & Exchange Comm'n,* 298 U. S. 1, with *United States* v. *Morgan,* 307 U. S. 183, 191.

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or

even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Of course, the Commission cannot intrude upon or usurp the court's function of adjudication. The decree is always what the court makes it; the court's jurisdiction to review is and remains exclusive, its judgment final. What the Commission has done, however, is not to modify but to follow up this decree. It has not asked this report in the name of the court, or in reliance upon judicial powers, but in reliance upon its own law-enforcing powers.

That Congress did not regard it as a judicial function to investigate compliance with court decrees, at least initially, is shown by its action as to other antitrust decrees. Section 6 (c) of the Act under consideration specifically authorizes the Commission, on its own initiative and without leave of court, to investigate compliance with final decrees in cases prosecuted by the Attorney General and not involving the Commission as a party. Congress obviously deemed it a function of the Commission, rather than of the courts, to probe compliance with such decrees, even when it had no part in obtaining them. It surely was not because of fear it would involve collision with the judicial function that Congress omitted express authorization for the Commission to follow up decrees in its own cases. Express grant of power would only seem necessary as to decrees in which the Commission had no other interest.

Whether the Commission has invaded any private right of respondents, we consider under later rubrics. Our only concern under the present heading is whether the Commission's order infringes prerogatives of the court. We hold it does not.

II. Violation of the Administrative Procedure Act.

The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

Thus § 3 (a) of the Act requires every agency to which it applies, which includes the Federal Trade Commission, to publish in the Federal Register certain statements of its rules, organization and procedure, "including the nature and requirements of all formal or informal procedures available," and adds that, "No person shall in any manner be required to resort to organization or procedure not so published." In addition § 6 (b) proscribes any requirement of a report or other investigative demand "in any manner or for any purpose except as authorized by law."

Principally on the basis of these two sections respondents contend that the current order cannot be enforced except in violation of the Administrative Procedure Act. Have the respondents been ordered to comply with procedure of which they were not put on notice by publication in the Federal Register? And to the extent that the procedure had been defined and published, was it authorized by law?

The pertinent provisions of the Administrative Procedure Act became effective September 11, 1946. On December 11, 1946, the Federal Trade Commission published in the Federal Register its Rules of Practice, 11 Fed. Reg. 14233–14239. The Commission's Rule XXVI, *id.*, 14237, republished without change in 12 Fed. Reg. 5444, 5448, sets the time limit for filing initial reports of compliance with Commission orders and asserts the Commission's right to require, within its sound discretion, the

filing of further compliance reports thereafter.[4] In § 7.12 of its Statement of Organization, Procedures, and Functions, 12 Fed. Reg. 5450, 5452, the Commission restated its right to require by order "such supplemental reports of compliance as it considers warranted," and defined the contents of such a report.[5]

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[4] "§ 2.26 *Reports showing compliance with orders and with stipulations.* (a) In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; *Provided, however,* That if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination . . . .

"(b) Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation. . . ."

[5] "§ 7.12 *Compliance and enforcement.* (a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of § 2.26 of the rules of practice. The Commission may by order require such supplemental reports of compliance as it considers warranted. Reports of compliance must consist of a full statement showing the manner and form in which the order has been complied with. Mere statements that the respondent is not violating the order are not acceptable. A factual showing is required sufficient to enable the Commission to appraise the manner and form of compliance.

"(b) After an order to cease and desist issued by the Commission pursuant to the Federal Trade Commission Act has become final as provided for under section 5 of that act, and the Commission has

We conclude that the Commission's published Rule XXVI announced the right it claims in this case to demand of a party against whom an enforcement decree has been entered that it "file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order . . . ." Taken together with the Commission's Statement of Organization, Procedures, and Functions, *supra,* if indeed not by itself, Rule XXVI amply met the requirements of § 3 (a) of the Administrative Procedure Act.

Respondents hardly challenge this conclusion. Theirs is the more subtle argument that requirement of supplemental reports following court enforcement of a Commission order is unauthorized by statute and *ultra vires,* so that no valid notice of Rule XXVI had been or could be given, as required by § 3 (a) of the Administrative Procedure Act. Also, it is said to be in direct violation of § 6 (b) of that Act. This leads to the question of statutory authority for the order to report, a question we must determine even apart from consideration of the Administrative Procedure Act. Accordingly we turn to the Federal Trade Commission Act itself to see whether it contains statutory authority for the Commission's Rule XXVI, as well as for its order here sought to be enforced, issued, as it was, pursuant to the procedures proclaimed

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reason to believe that a respondent has violated such order, it shall certify the facts concerning the violation to the Attorney General, who may institute a suit in one of the District Courts of the United States for the recovery of civil penalties as provided in the act. In proceedings under the Federal Trade Commission Act, where a Circuit Court of Appeals of the United States has by decree commanded obedience to the Commission's order, enforcement may be accomplished by way of contempt proceedings in the Circuit court. With respect to orders under the various provisions of the Clayton Act, enforcement must be accomplished by way of contempt proceedings. . . ."

in that Rule. If we find such statutory authority, we must conclude that the objections under the Administrative Procedure Act are taken in vain.

III. Statutory Authority to Require Reports.

The Court of Appeals found the Commission to be without statutory authority to require additional reports as to compliance. Section 6 of the Federal Trade Commission Act, it thought, could not be invoked in connection with a decree sought and entered pursuant to § 5, which sections the court regarded as insulated from each other and directed to wholly different situations. Section 6, so it was held, authorized requirement only of "special reports" supplemental to "annual reports" and could not be authority for requiring special reports supplemental to a report of compliance required by court decree in a § 5 case.

At the root of this position lies the elaborate and plausible argument of respondents that §§ 5 and 6 of the Act set up self-sufficient, independent and exclusive procedures for dealing with different matters and that therefore neither section can be supported or aided by the other. Respondents also say that the present use of the asserted power is novel and unprecedented in Commission practice and introduces a new method of investigating compliance. Respondents are not without statements by the Commission or its officials, *dicta* from judicial opinions, views of text writers and facts of legislative history which give some support to this theory. But this Court never before has been called upon to deal consciously and squarely with the subject.

The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack

of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser.

The Commission's organic Act, § 5, comprehensively provides substantive and procedural rules for checking unfair methods of competition. The procedure is complete from complaint and service of process through final order, court review, and enforcement proceedings to recover penalties which are not those here sued for. This entire subject of unfair competition, it is true, came into the bill late in its legislative history and dealt with a commercial evil quite different from the target of prior antitrust laws. It is to be noted, however, that although complete otherwise, this section confers no power to investigate this or any other matter. That power, without which all others would be vain, must be found in other sections of the Act. The Commission, for power to investigate compliance with a § 5 order, has turned to § 6, which authorizes it to require certain reports but is not expressly applicable to a § 5 case. Respondents say it might better have turned to § 9, which authorizes it to send investigators to examine their books, copy documents and issue subpoenas, and which is expressly applicable to § 5 proceedings.

Section 6, on which the Commission relies, adds, among other things and with exceptions not material, the power "to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, . . . and its relation to other corporations and to individuals, associations, and partnerships." It also authorizes the Commission "to require, by general or special orders, corporations engaged in commerce . . . to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing

to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing."

To one informed of no fact apart from this text, it would appear to grant ample power to order the reports here in question. Respondents are in the class subject to inquiry, the call is for what appears to be a special report and the matter to be reported would seem to be as to business conduct and practices about which the Commission is authorized to inquire. But respondents advance several arguments to persuade us that this seemingly comprehensive power is subject to limitations not evident in the text.

Respondents derive from legislative history their contention that Congress divided the duties and powers of the Commission into two separate categories, one in § 6 merely re-enacting the old powers of investigation and publicity in antitrust matters—"essentially a mere continuance of the former powers of the old Bureau of Corporations." The other was a new unfair-competition power, self-contained and sealed off in § 5. It is argued that the reports set forth in § 6 can be required only "in support of general economic surveys and not in aid of enforcement proceedings under . . . section 5."

While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that the information procured would be chiefly useful in reports to the President, the Congress, or the Attorney General, we find nothing that would deny its use for any purpose within the duties of the Commission, including a § 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commis-

sion to pursue the rest of its duties as if the information did not exist would be unusual, to say the least. The information was such as the Commission was authorized to obtain and we think it could be required for use in determining whether there had been proper compliance with the court's decree in a § 5 case.

It is argued, however, and the court below has agreed, that the "special report" authorized by statute does not embrace the one here asked as to the method of compliance with the decree. We find nothing in the legislative history that would justify so limiting the meaning of special reports, or holding that the report here asked is not such a one. The very House Committee Report (H. R. Rep. No. 533, 63d Cong., 2d Sess.) which the court below thought sustained respondents' contention, we read in its context to support the Commission. Speaking of what became this section, the Report said, "The commission, under this section, may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary." *Id.*, at p. 4. An annual report of a corporation is a recurrent and relatively standardized affair. The special report was used to enable the Commission to elicit any information beyond the ordinary data of a routine annual report. If the report asked here is not a special report, we would be hard put to define one.

Nor does the fact that § 5 applies to individuals, partnerships, and corporations, while §§ 6 (b) and 10 apply only to corporations, lead us to conclude that the Act must not be read as an integrated whole. The argument that, because the reporting and penalty provisions of the latter extend only to corporations they must not be invoked to implement, as against corporations, a § 5 pro-

ceeding which contemplates action against persons and partnerships as well, would have force were there not sound reason for more drastic powers to compel disclosure from corporations than from natural persons. What the former may be compelled to disclose without objection the latter may withhold, or reveal only after exacting the price of immunity from prosecution. Corporations not only have no constitutional immunity from self-incrimination, but the disparity between artificial and natural persons is so significant that differing treatment can rarely be urged as an objection to a particular construction of a statute. Moreover, Congress may have considered that the volume or proportion of unincorporated business or the relatively small size of individually owned enterprises, or even a lesser capacity and disposition to resist made it possible to omit persons from duties and penalties imposed on artificial combinations of capital.

We conclude that the authority of the Commission under § 6 to require special reports of corporations includes special reports of the manner in which they are complying with decrees enforcing § 5 cease and desist orders.

IV. Rights Under Fourth and Fifth Amendments.

The Commission's order is criticized upon grounds that the order transgresses the Fourth Amendment's proscription of unreasonable searches and seizures and the Fifth Amendment's due process of law clause.

It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. *Cf. Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186. Although the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," Brandeis, J., dissenting in *Olmstead* v. *United States,* 277 U. S. 438, 471, at 478, is not confined literally to searches and seiz-

ures as such, but extends as well to the orderly taking under compulsion of process, *Boyd* v. *United States,* 116 U. S. 616, *Hale* v. *Henkel,* 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale* v. *Henkel, supra; United States* v. *White,* 322 U. S. 694.

While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. *Cf. United States* v. *White, supra.* They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. *Cf. Graham* v. *Brotherhood of Locomotive Firemen,* 338 U. S. 232; *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210; *Wickard* v. *Filburn,* 317 U. S. 111, at 129. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n* v. *American Tobacco Co., supra.* But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure

sought shall not be unreasonable." *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 208. Nothing on the face of the Commission's order transgressed these bounds.

Nor do we consider whether, for reasons peculiar to these cases not apparent on the face of the orders, these limits are transgressed. Such questions are not presented by the procedure followed by respondents. Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions. Neither respondent raised objection to the order's sweep, nor asked any modification, clarification or interpretation of it. Both challenged, instead, power to issue it. Their position was that the Commission had no more authority to issue a reasonable order than an unreasonable one. That, too, was the defense to this action in the court below.

Of course, there are limits to what, in the name of reports, the Commission may demand. Just what these limits are we do not attempt to define in the abstract. But it is safe to say that they would stop the Commission considerably short of the extravagant example used by one of the respondents of what it fears if we sustain this order—that the Commission may require reports from automobile companies which include filing automobiles. In this case we doubt that we should read the order as respondents ask to require shipment of extensive files or gifts of expensive books. This is not a necessary reading certainly, and other parties to the decree seem to have been able to satisfy its requirements.

If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had oppor-

tunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.

It is argued that if we sustain this use of § 6, the power will be unconfined and its arbitrary exercise subject to no judicial review or control, unless and until the Government brings suit, as here, for penalties. The Government, it is said, may delay such action while ruinous penalties accumulate and defendant runs the risk that his defenses will not be sustained. However, we are not prepared to say that courts would be powerless if after an effort to clarify or modify such an order it still is considered to be so arbitrary as to be unlawful and the Government pursues a policy of accumulating penalties while avoiding a judicial test by refusing to bring action to recover them. Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. *Cf. Oklahoma Operating Co.* v. *Love,* 252 U. S. 331. It is enough to say that, in upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act.

The judgment accordingly is

Reversed.

Mr. Justice Douglas and Mr. Justice Minton took no part in the consideration or decision of these cases.

WISSNER ET AL. *v.* WISSNER.

APPEAL FROM THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF CALIFORNIA.

No. 119. Argued December 6–7, 1949.—Decided February 6, 1950.

An insured under a National Service Life Insurance policy, who was domiciled in California, as was his wife, designated his mother as principal beneficiary and his father as contingent beneficiary. Premiums on the policy were paid from the insured's Army pay. Since his death the proceeds of the policy were being paid to his mother in monthly installments. The insured's widow brought suit in a California court, alleging that, under the state community property law, she was entitled to one-half the proceeds of the policy. The court gave judgment to the widow for one-half of the payments already received and required payment to her of one-half of all future payments immediately upon receipt thereof. *Held:*

1. The judgment of the state court was invalid as in conflict with the National Service Life Insurance Act of 1940. Pp. 656–660.

(a) Under 38 U. S. C. § 802 (g), the proceeds of such a policy belong to the named beneficiary; and the judgment below would nullify the soldier's choice and frustrate the purpose of Congress. Pp. 658–659.

(b) So far as it ordered diversion of future payments, the judgment contravenes the provision of 38 U. S. C. § 454a that payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary . . . ." P. 659.

(c) A different result is not required by decisions holding exemptions relating to pensions and veterans' relief inapplicable when alimony or the support of wife or children is in issue. Pp. 659–660.

2. The National Service Life Insurance Act is a valid exercise of the congressional powers over national defense. Pp. 660–661.

3. No issue under the Fifth Amendment is presented; because the Act precludes any claim by the widow of a "vested" right in the proceeds of the insurance. P. 661.

89 Cal. App. 2d 759, 201 P. 2d 837, reversed.

In a suit in a California state court, by the widow of an insured under a National Service Life Insurance policy, to recover one-half the proceeds of the policy, the state court gave judgment for the plaintiff. The District Court of Appeal affirmed. 89 Cal. App. 2d 759, 201 P. 2d 837. The State Supreme Court denied a hearing. On appeal to this Court, *reversed,* p. 661.

Carlos J. Badger argued the cause for appellants. With him on the brief were *W. Coburn Cook* and *Vernon F. Gant.*

Leslie A. Cleary argued the cause for appellee. With him on the brief was *William Zeff.*

By special leave of Court, *Morton Hollander* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney.*

MR. JUSTICE CLARK delivered the opinion of the Court.

We are to determine whether the California community property law, as applied in this case, conflicts with certain provisions of the National Service Life Insurance Act of 1940; [1] and if so, whether the federal law is consistent with the Fifth Amendment to the Constitution of the United States. The cause is here on appeal from the final judgment of a California District Court of Appeal, the Supreme Court of California having denied a hearing. Reading the opinion below as a decision that the federal statute was unconstitutional, we noted probable jurisdiction. 28 U. S. C. § 1257 (1).

The material facts are not in dispute. Appellants are the parents, and appellee the widow, of Major Leonard O. Wissner, who died in India in 1945 in the service of the

[1] 54 Stat. 1008, as amended, 38 U. S. C. § 801 *et seq.* Amendments added in 1946, 60 Stat. 781, do not concern us here.

United States Army. He had enlisted in the Army in November 1942 and in January 1943 subscribed to a National Service Life Insurance policy in the principal sum of $10,000, which policy was in effect at the date of his death. The opinion below indicates that the decedent and appellee were estranged at the time he entered the Army or shortly thereafter. In January 1943 he requested his attorney to "get an insurance policy away" from appellee. After six months in the service decedent stopped the allotment to his wife, and in September 1943 expressed the wish that he "could find some way of forcing plaintiff to a settlement and a divorce." It is not surprising, therefore, that, without the knowledge or consent of his wife, the Major named his mother principal and his father contingent beneficiary under his National Service Life Insurance policy. Since his death the United States Veterans' Administration has been paying his mother the proceeds of the policy in monthly installments.

In 1947 the Major's widow brought action against the appellants in the Superior Court for Stanislaus County, State of California, alleging that under California community property law she was entitled to one-half the proceeds of the policy. Appellants answered that their designation as beneficiaries was "final and conclusive as against any claimed rights" of appellee. The court found that the decedent and his widow had been married in 1930, and until the date of Major Wissner's death had been legally domiciled there and subject to the state's community property laws. Major Wissner's army pay, which was held to be community property under California law,[2] was the source of the premiums paid on the policy.

[2] We assume the correctness of the lower court's statement of state law. See also *French* v. *French*, 17 Cal. 2d 775, 112 P. 2d 235 (1941). The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property.

But no claim was made for the premiums; the widow sought the proceeds of the insurance. The court concluded that, consistent with California law in the ordinary insurance case, the proceeds of this policy "were and are the community property" of the widow and the decedent, and entered judgment for appellee for one-half the amount of payments already received, plus interest, and required appellants to pay appellee one-half of all future payments "immediately upon the receipt thereof" by appellees or either thereof. The District Court of Appeal affirmed, 89 Cal. App. 2d 759, 201 P. 2d 837 (1949), holding that appellee had a "vested right" to the insurance proceeds, and the Supreme Court of California denied a hearing, one judge dissenting.

We are of the opinion that the decision below was incorrect. The National Service Life Insurance Act is the congressional mode of affording a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States. A liberal policy toward the serviceman and his named beneficiary is everywhere evident in the comprehensive statutory plan. Premiums are very low and are waived during the insured's disability; costs of administration are borne by the United States; liabilities may be discharged out of congressional appropriations.

The controlling section of the Act provides that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries . . . ." 38 U. S. C. § 802 (g). Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other. Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice. He chose his mother. It is plain to us that the judgment of the lower court, as

to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money. We do not share appellee's discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express direction of the insured. Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand.

The judgment under review has a further deficiency so far as it ordered the diversion of future payments as soon as they are paid by the Government to the mother. At least in this respect, the very payments received under the policy are to be "seized," in effect, by the judgment below. This is in flat conflict with the exemption provision contained in 38 U. S. C. § 454a, made a part of this Act by 38 U. S. C. § 816: Payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . ."

We recognize that some courts have ruled that this and similar exemptions relating to pensions and veterans' relief do not apply when alimony or the support of wife or children is in issue. See *Schlaefer* v. *Schlaefer,* 71 App. D. C. 350, 112 F. 2d 177 (1940); *Tully* v. *Tully,* 159 Mass. 91, 34 N. E. 79 (1893); *Hodson* v. *New York City Employees' Retirement System,* 243 App. Div. 480, 278 N. Y. Supp. 16 (1935); *In re Guardianship of Bagnall,* 238 Iowa 905, 29 N. W. 2d 597 (1947), and cases therein cited. But cf. *Brewer* v. *Brewer,* 19 Tenn. App. 209, 239–241, 84 S. W. 2d 1022, 1040 (1933). We shall not attempt to epitomize a legal system at least as ancient as the cus-

toms of the Visigoths,[3] but we must note that the community property principle rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit. See de Funiak, Community Property, § 11 (1943). Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases. Our view of those cases, whatever it may be, is irrelevant here.[4] Further, Congress has provided in the National Service Life Insurance Act that the chosen beneficiary of the life insurance policy shall be, during life, the sole owner of the proceeds.

The constitutionality of the congressional mandate above expounded need not detain us long. Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within

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[3] See Lobingier, An Historical Introduction to Community Property Law, 8 Nat. Univ. L. Rev. (No. 2), p. 45 (1928); de Funiak, Community Property, c. II (1943).

[4] There are, of course, support aspects to the community property principle, and in some cases they may be of considerable importance. Likewise alimony may not be limited to the amount essential to support the divorced spouse. But we do not think the Congress would have intended decision to turn on factual variations in the spouse's need. If there is a distinction to be drawn, we think it must be based upon a generalization as to the dominating characteristics of a particular class of cases—alimony cases, support cases, community property cases. The alimony cases have uniformly been decided on that basis.

the congressional powers over national defense, and the means are adapted to the chosen end. The Act is valid. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819). And since the statute which made the insurance proceeds possible was explicit in announcing that the insured shall have the right to designate the recipient of the insurance, and that "No person shall have a vested right" to those proceeds, 38 U. S. C. § 802 (i), appellee could not, in law, contemplate their capture. The federal statute establishes the fund in issue, and forestalls the existence of any "vested" right in the proceeds of federal insurance. Hence no constitutional question is presented. However "vested" her right to the proceeds of nongovernmental insurance under California law, that rule cannot apply to this insurance. Compare *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426 (1934); *Lynch* v. *United States,* 292 U. S. 571 (1934). See *Hines* v. *Lowrey,* 305 U. S. 85 (1938); *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240 (1935); *Ruddy* v. *Rossi,* 248 U. S. 104 (1918).

The judgment below is

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE MINTON, dissenting.

MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, and I are unable to agree with the majority in this case. The husband's earnings are community property under § 161a, California Civil Code. The wife has a vested interest in one-half of such earnings. *United States* v. *Malcolm,* 282 U. S. 792; *Bank of America* v. *Mantz,* 4 Cal. 2d 322, 49 P. 2d 279; *Cooke* v. *Cooke,* 65 Cal. App. 2d 260, 150 P. 2d 514.

If the premiums on a policy in a private insurance company had been paid out of community property without

the wife's consent, the wife could claim her proportionate share of the insurance. *Grimm* v. *Grimm*, 26 Cal. 2d 173, 157 P. 2d 841; *Cooke* v. *Cooke, supra; Bazzell* v. *Endriss*, 41 Cal. App. 2d 463, 107 P. 2d 49; *Mundt* v. *Connecticut General Life Ins. Co.*, 35 Cal. App. 2d 416, 95 P. 2d 966.[1]

It is claimed that the exemption provision of the federal statute prevents the same rule from applying here. This provision, 49 Stat. 609, 38 U. S. C. § 454a, provides:

> "Payments of benefits due or to become due . . . shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

What did Congress contemplate by the enactment of this provision? I think the statute presupposes that the beneficiary is the undisputed owner of the proceeds, and that a creditor has sought to reach the fund on an independent claim. Under those circumstances the remedy is denied, for the statute immunizes the fund from levy or attachment. That is not the case before us. The nature of this dispute is a claim by the wife that she is the *owner* of a half portion of these proceeds because such proceeds are the fruits of funds originally hers.

And recognition of her status as an owner glaringly reveals the irrelevancy of the choice of beneficiary provision. 54 Stat. 1010, 38 U. S. C. § 802 (g). Congress stated that the serviceman was to have the right to designate his beneficiary. When he has done so all other persons than the

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[1] " . . . the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the nonconsenting wife may recover an undivided one-half thereof . . . without regard to the disproportionate size of the premium when compared with the face of the policy." *Mundt* v. *Connecticut General Life Ins. Co.*, 35 Cal. App. 2d at 421, 95 P. 2d at 969.

one selected are foreclosed from claiming the proceeds as beneficiary. No further effect has the statute. Here the wife makes no claim to rights as a beneficiary. I am not persuaded that either the choice of beneficiary or the exemption provision should carry the implication of wiping out family property rights, which traditionally have been defined by state law. Fully to respect the right which Congress gave the serviceman to designate his beneficiary does not require disrespect of settled family law and the incidents of the family relationship. As noted in the opinion of the Court, analogous occasions have found courts expressing greater reluctance to obliterate rights recognized by the states.[2]

Even accepting the Court's view that the exemption provision applies to the wife, it was intended to protect the fund from attachment, levy, or seizure only so long as it could be identified as a fund. No attachment, levy, or seizure is attempted here. This was an action at law for a money judgment. Appellee obtained a judgment for one-half of the payments that had been collected by the beneficiaries and for one-half of those to be collected thereafter. Payments received under the policy are only the measure of the recovery.

To allow such a judgment does not interfere with the fund or the free designation of the beneficiary by the serviceman. I cannot believe that Congress intended to

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[2] The Court has sought to distinguish, unsuccessfully I think, the many cases holding that payments received as pension, disability insurance, or veterans' compensation are not exempted from claims for alimony or family support by exemption statutes in the pattern of § 454a. Exhaustive discussions may be found in *In re Bagnall's Guardianship,* 238 Iowa 905, 29 N. W. 2d 597; *Schlaefer* v. *Schlaefer,* 71 App. D. C. 350, 112 F. 2d 177. See also *Gaskins* v. *Security-First Nat. Bank of Los Angeles,* 30 Cal. App. 2d 409, 86 P. 2d 681; *Hollis* v. *Bryan,* 166 Miss. 874, 143 So. 687. Cf. Note, 11 A. L. R. 123 and succeeding annotations.

say to a serviceman, "You may take your wife's property and purchase a policy of insurance payable to your mother, and we will see that your defrauded wife gets none of the money." Certainly Congress did not intend to upset the long-standing community property law of the states where it was not necessary for the protection of the Government in its relation to the soldier or to the integrity of the fund from "attachment, levy, or seizure." These are words of art. They have a definite meaning and usage in the law. This usage is not present here. I find nothing in the section that prohibits the beneficiary from being sued at any time on a matter growing out of the transaction by which the soldier acquired the insurance, at least where there is no attempt to attach, levy, or seize the fund. It was the fund Congress was interested in protecting, not the beneficiary. I would affirm.

Syllabus.

NEW JERSEY REALTY TITLE INSURANCE CO. *v.* DIVISION OF TAX APPEALS OF NEW JERSEY ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 147. Argued December 13, 1949.—Decided February 6, 1950.

Under § 54:4–22 of the Revised Statutes of New Jersey, as amended by Laws of 1938, c. 245, a taxing district of the State levied against the intangible property of a stock insurance company an assessment for the taxable year 1945 in the amount of 15 per cent of the company's paid-up capital and surplus, computed without deducting the principal amount of certain United States bonds and accrued interest thereon. *Held:* The assessment was invalid as in conflict with § 3701 of the Revised Statutes of the United States, which provides that "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." Pp. 666–676.

(a) The tax authorized by the state statute, whether levied against capital and surplus less liabilities or against entire net worth, was in practical operation and effect a tax upon federal bonds. Pp. 672–673.

(b) *Tradesmens National Bank* v. *Oklahoma Tax Comm'n,* 309 U. S. 560, and *Educational Films Corp.* v. *Ward,* 282 U. S. 379, distinguished. Pp. 673–674.

(c) A tax on corporate capital measured by federal securities may be invalid even though imposed without discrimination against federal obligations. Pp. 674–675.

(d) If the amount here assessed be viewed as levied exclusively on the corporation's net worth remaining after deduction of government bonds and interest, the assessment would be discriminatory because it would be levied at the rate of over 79 per cent of the corporation's assessable valuation rather than at the rate of 15 per cent prescribed by the state statute. P. 675.

(e) The result here reached is consonant with the legislative purpose of R. S. § 3701 "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." P. 675.

(f) The legislative purpose of R. S. § 3701 also requires the exemption from assessment under the state statute of interest on federal securities which had accrued but had not yet been paid. Pp. 675–676.

1 N. J. 496, 64 A. 2d 341, reversed.

An order of a state tax agency dismissing appellant's appeal from an assessment was reversed by the former New Jersey Supreme Court. 137 N. J. L. 444, 60 A. 2d 265. The Supreme Court of New Jersey as established under the present state constitution reversed. 1 N. J. 496, 64 A. 2d 341. On appeal to this Court, *reversed*, p. 676.

Walter Gordon Merritt argued the cause for appellant. With him on the brief were *H. Gardner Ingraham* and *Charles B. Niebling*.

Vincent J. Casale argued the cause for appellees. With him on the brief for the City of Newark, appellee, was *Charles Handler*.

MR. JUSTICE CLARK delivered the opinion of the Court.

A taxing district of New Jersey has levied against the intangible personal property of a domestic corporation an assessment for the taxable year 1945 in the amount of 15 per cent of the taxpayer's paid-up capital and surplus, computed without deducting the principal amount of certain United States bonds and accrued interest thereon. This appeal challenges the validity of the assessment and of the tax statute under which it was levied, on the ground of conflict with Art. I, § 8 of the Federal Constitution, by which Congress is authorized "To borrow Money on the credit of the United States," and with § 3701 of the Revised Statutes (1875), 31 U. S. C. § 742, which generally exempts interest-bearing obligations of the United States from state and local taxation.

The assessment in question was levied under § 54:4–22 of the Revised Statutes of New Jersey (1937), as amended by Laws of 1938, c. 245.[1] N. J. Rev. Stat. Cum. Supp., Laws of 1938, 1939, 1940, § 54:4–22. That section provided as follows:

> "Every stock insurance company organized under the laws of this state, other than a life insurance company, shall be assessed and taxed in the taxing district where its office is situated, upon the full amount or value of its property (exclusive of real estate and tangible personal property, which shall be separately assessed and taxed where the same is located, and exclusive of all shares of stock owned by such insurance company and exclusive of nontaxable property and of property exempt from taxation), deducting from such amount or value all debts and liabilities certain and definite as to obligation and amount, and the full amount of all reserves for taxes, and such proportion of the reserves for unearned premiums, losses and other liabilities as the full amount or value of its taxable intangible property bears to the full amount or value of all its intangible property; *provided, however,* the assessment against the intangible personal property of any stock insurance company subject to the provisions of this section shall in no event be less than fifteen per centum of the sum of the paid-up capital and the surplus in excess of the total of all liabilities of such company, as the same are stated in the annual statement of such company for the calendar year next preceding the date of such assessment and filed with the department of banking and insurance of the state of New Jersey, after deducting from such total of capi-

[1] Section 54:4–22 is included under "Title 54. Subtitle 2. Taxation of Real and Personal Property in General."

tal and surplus the amount of all tax assessments against any and all real estate, title to which stands in the name of such company.

"The capital stock in any such company shall not be regarded for the purposes of this act [section] as a liability and no part of the amount thereof shall be deducted, and the person or persons or corporations holding the capital stock of such company shall not be assessed or taxed therefor. No franchise tax shall be imposed upon any insurance company included in this section." (Italics added.) [2]

A corporation subject to this section was taxable at the rate of the local taxing district.

Appellant is New Jersey Realty Title Insurance Company, a stock insurance company of New Jersey with its office in the City and taxing district of Newark, County of Essex, New Jersey. For the year 1945 the City of Newark levied an assessment of $75,700 on appellant's intangible personal property and collected from it a tax of $3,906.12 computed thereon.

Appellant had filed a return [3] based on its balance sheet at the close of business September 30, 1944, showing total assets of $774,972.98, the entirety of which was declared to be intangibles. In calculating its "total taxable intangibles" appellant deducted the following from its total assets: United States Treasury Bonds of the face amount of $450,000; accrued interest thereon in the amount of $1,682.25; and other nontaxable or exempt property valued at $318,771.95. The aggregate amount

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[2] By an amendment adopted in 1945, but not operative on the assessment date here involved, the last sentence of § 54:4–22 as quoted above was deleted. N. J. Rev. Stat. Cum. Supp., Laws of 1945, 1946, 1947, § 54:4–22.

[3] The return was on a form furnished by the taxing district and entitled "Personal Property Return of Stock Insurance Company for Year 1945 Under Section 54:4–22 of Revised Statutes."

of the property thus excluded was $770,454.20. The remainder, $4,518.78, was entered on the return as the total taxable intangibles. From this amount appellant deducted: $25,756.63 as "debts and liabilities certain"; $28,175.46 as "reserves for taxes"; and $758.13 as "proportion of loss and premium." There is no disagreement with these computations. As observed by the highest court below, these deductions "left no balance of assessable property subject to tax."

The taxing district therefore assessed appellant's property under the proviso in § 54:4–22 which directed an assessment of not less than 15 per cent of "the sum of the paid-up capital and the surplus in excess of the total of all liabilities" of appellant as shown by its annual statement for the preceding calendar year filed with the state department of banking and insurance. The manner of computation of the assessment is not explicit in the record. Moreover, the opinion of the highest court of New Jersey is subject to several interpretations as to the proper method of computing the assessment. The court stated that the assessment "may not be less in amount than 15 percent of the paid-up capital and surplus *as defined by the statute.*" (Italics added.) If by the phrase "as defined by the statute," the court referred to the language of the proviso in § 54:4–22, "paid-up capital and the surplus *in excess of the total of all liabilities*" (italics added), it would seem necessary to deduct liabilities from capital and surplus in determining the basis for the 15 per cent computation. The basis of computation would then be $496,999.70,[4] and the 15 per cent sum, $74,549.95.

[4] The financial statement for 1943 reflected the following items: paid-up capital $250,000; paid-in surplus $250,000; earned surplus $47,462.93; liabilities $50,463.23; United States Treasury Bonds and accrued interest of $452,526.06. Reserves amounted to $161,047.74, not including reserves for federal income tax which are not shown in the record. It seems probable that if the New Jersey

The court subsequently stated that "The assessment may equal or exceed 15 percent of the paid-up capital and surplus, and does not necessarily have to be precisely the same, but . . . can not be less in amount than 15 percent of the paid-up capital and surplus." Such references to "paid-up capital and surplus," together with the court's characterization of the tax as laid on net worth, suggest that the assessment is computed against appellant's net worth of $547,462.93. On this basis, however, the 15 per cent sum would have been not less than $82,119.43, and the present assessment of less amount would not satisfy the court's interpretation of the statute as requiring a levy of not less than 15 per cent. For our disposition of this case, however, it is unnecessary to choose between these conflicting interpretations of the opinion of the court below.

Clearly the State of New Jersey has negatived any purpose to authorize a tax assessment against the appellant's United States bonds. The court below conceded that the securities involved were, at the time of the assessment, exempt from state, municipal or local taxation. It is equally clear, however, that in the computation of the assessment the face value of appellant's government bonds, together with the interest thereon, was in fact included.[5]

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court did approve the construction of § 54:4–22 suggested above, it meant to authorize the deduction of nonreserve liabilities only. Both appellant and appellee have assumed in their briefs that if any deduction of liabilities from capital and surplus was authorized under the statute, only nonreserve liabilities were deductible.

[5] If under the proviso of § 54:4–22 "the total of all liabilities" of appellant is deductible from "the paid-up capital and the surplus," and the 15 per cent must be computed against the figure of $496,999.70, deduction therefrom of appellant's United States bonds and interest leaves only $44,473.64. If, however, the basis of computation is appellant's net worth of $547,462.93, then there is a

Contending that § 54:4–22 as thus applied contravenes paramount federal provisions, appellant sought cancellation of the assessment on appeal to the Division of Tax Appeals in the Department of Taxation and Finance of New Jersey. The Division's opinion recommending dismissal referred to the proceeding as "a personal property appeal." Its order of dismissal was reversed by the former New Jersey Supreme Court on writ of certiorari. 137 N. J. L. 444, 60 A. 2d 265. That court viewed the levy as an ad valorem tax on personalty; after concluding that the tax would be valid only if the bonds and interest were excluded from the computation, the court construed the tax statute as requiring such exclusion. This ruling was reversed by the Supreme Court of New Jersey as established under the present Constitution of the State. 1 N. J. 496, 64 A. 2d 341. The highest court of the state declared that the assessment was "against the intangible property" but "concluded that the tax levied . . . is not an ad valorem tax or property tax but rather is a . . . tax upon the net worth of the company." It held that such a tax, having been imposed without discrimination, was constitutionally permissible. From this decision the present appeal was taken. We noted probable jurisdiction, 28 U. S. C. § 1257 (2).

The assessment must fall as in conflict with § 3701 of the Revised Statutes, providing that "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

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remainder of $94,936.87 after deducting the government bonds and interest. But neither the appellee nor any of the courts below has sought to uphold the assessment of $75,700 as having been computed solely against this excess over bonds and interest. In fact it may be implied from appellee's brief that if the amount of federal bonds and interest must be deducted from net worth, the excess of net worth after such deduction is subject to assessment at the 15 per cent rate.

If we consider the assessment as a 15 per cent levy either against capital and surplus less liabilities or against entire net worth, we take as guides to our application of § 3701 the decisions of this Court on the related constitutional question of immunity in *Bank of Commerce* v. *New York City,* 2 Black 620 (1863), and the *Bank Tax Case,* 2 Wall. 200 (1865), which considered assessments under state taxing provisions not substantially distinguishable from New Jersey's § 54:4–22 as thus applied. The *Bank of Commerce* case involved an assessment levied upon the actual value of the capital stock, less the value of real estate, of a corporate taxpayer which had invested in United States securities all of its assets other than its realty. In holding the tax invalid as an interference with the federal borrowing power, the Court rejected the contention that the assessment should be sustained as a levy upon corporate capital represented by federal securities. In the *Bank Tax Case* this Court considered assessments levied against "the amount of . . . capital stock paid in or secured to be paid in, and . . . surplus earnings" of banking corporations which had invested all or a large part of their capital in government securities. As against the contention that this Court should regard as conclusive the state court's characterization of the tax as one laid on capital and surplus, it was held that the assessments were unconstitutional. The Court observed that

> "when the capital . . . thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. . . . The legislature . . . when providing for a tax on . . . capital at a valuation . . . could not

> but have intended a tax upon the property in which the capital had been invested. . . . such is the practical effect of the tax . . . ." 2 Wall. at 208–209.

And in *Bank* v. *Supervisors,* 7 Wall. 26 (1869), it was held that certain issues of United States notes were exempt from assessment under the statute considered in the *Bank Tax Case, supra,* in view of a congressional provision, which foreshadowed § 3701, that United States securities "shall be exempt from taxation by or under State authority." 12 Stat. 346. And see *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 528 (1914); *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 512–513 (1907).

It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax authorized by § 54:4–22, whether levied against capital and surplus less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it.

The court below, describing the tax as levied on net worth and indirectly on capital and surplus measured in part by tax-exempt property, held it valid on the authority of *Tradesmens Nat. Bank* v. *Oklahoma Tax Comm'n,* 309 U. S. 560 (1940), and *Educational Films Corp.* v. *Ward,* 282 U. S. 379 (1931). The decision in the *Tradesmens Bank* case does not bear upon the present controversy. There the Court upheld a state tax statute adopted pursuant to an act of Congress authorizing state taxation of national banks. Moreover, the tax there considered, as well as that under scrutiny in the *Educational Films Corp.* case, was not measured in effect by the

amount of the taxpayer's federal securities or interest but was a franchise tax measured by net income.[6] The section here in question was not considered as imposing a tax on privilege or franchise by either the New Jersey Legislature [7] or the taxing officials [8] or by any of the courts below.[9] While we are not limited by the State's characterization of its tax, cf. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443 (1940), we likewise do not think the assessment can be sustained as one levied on a corporate franchise. In considering the similar tax on capital and earned surplus under review in the *Bank Tax Case, supra,* this Court declared that the levy was "imposed on the property of the institutions, as contradistinguished from a tax upon their privileges or franchises." 2 Wall. at 209.

If the assessment is considered to be 15 per cent of capital and surplus less liabilities or of entire net worth, we agree with the court below that the tax levied under § 54:4–22 does not impose a discriminatory burden on federal issues as did the tax statute against which § 3701 was invoked in *Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313 (1930). But since the decision in *Bank of Commerce*

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[6] In all other decisions in which a state tax has been upheld, against the contention that it was in effect levied on a corporate taxpayer's federal bonds or interest, the tax was a franchise levy, measured either by amount of bank deposits, *Society for Savings* v. *Coite,* 6 Wall. 594 (1868); *Provident Institution* v. *Massachusetts,* 6 Wall. 611 (1868), or by the market value of the taxpayer's shares, *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632 (1868), or by dividends declared or paid, *Home Ins. Co.* v. *New York,* 134 U. S. 594 (1890).

[7] See notes 1 and 2 *supra.*

[8] See note 3 *supra.*

[9] The highest court of New Jersey declared that its decision was required "whether the taxing statute is a franchise tax or a tax upon the net worth of the company, *which latter we hold the tax under the statute before us to be.*" 1 N. J. 502, 64 A. 2d 344. (Italics added.)

v. *New York City, supra,* it has been understood that a tax on corporate capital measured by federal securities may be invalid even though imposed without discrimination against federal obligations.

If, however, the assessment of $75,700 is viewed as if it were levied exclusively upon appellant's net worth remaining after deduction of government bonds and interest, the assessment would be discriminatory since it would be levied at the rate of over 79 per cent of appellant's assessable valuation of $94,936.87 rather than at the rate of 15 per cent prescribed by § 54:4–22. Such increased rate of assessment would result solely from appellant's ownership of federal issues. In the *Gehner* case, *supra,* this Court held that § 3701 was offended by a computation which allowed deduction of the full amount of the taxpayer's federal bonds yet at the same time pared down the net value of other allowable exemptions, to the taxpayer's disadvantage, solely because of such ownership of federal bonds. Consistently with the *Gehner* decision, we can only hold that § 3701 is violated by an automatic increase in the rate of assessment applied to appellant's valuation after deduction of federal bonds.

The result which is thus indicated is also required by the legislative purpose, which we have found in § 3701, "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith* v. *Davis,* 323 U. S. 111, 117 (1944).

The legislative purpose of § 3701 also required the exemption from assessment under § 54:4–22 of interest on federal securities which had accrued but was not yet paid. Cf. *Hibernia Savings & Loan Society* v. *San Francisco,* 200 U. S. 310 (1906). Congress on occasion has expressly declared an exemption from state taxation of

interest on federal securities,[10] and we do not find a contrary purpose disclosed by the omission from § 3701 of the phrase "and interest thereon."

The assessment for tax under § 54:4–22 of the New Jersey Revised Statutes as levied is in conflict with the paramount provision of § 3701 of the Revised Statutes. The decision of the Supreme Court of New Jersey is

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

I agree that New Jersey cannot tax United States bonds made tax-exempt by Congress. This Court has consistently held, however, that such bonds need not be excluded from computation of a justifiable state tax imposed on corporations created by or doing business within the state. A short time ago we said that "The power of a state to levy a tax on a legitimate subject, such as a franchise, measured by net assets or net income including tax-exempt federal instrumentalities or their income is likewise well settled." *Tradesmens Bank* v. *Tax Comm'n*, 309 U. S. 560, 564; and see cases there cited. I do not see how the Court's opinion here can possibly be reconciled with that principle, for it seems clear to me that this New Jersey tax as applied falls within such a classification.

The state law under which this tax was levied applies only to stock insurance companies organized under New Jersey laws. The first part provides for a tax on intangible property to be computed by a formula which expressly excludes tax-exempt bonds, as well as certain reserves, from the property subject to tax. To avoid the possibility that occasionally this formula might produce

[10] See 16 Stat. 272; 39 Stat. 1000, 1003; 40 Stat. 288, 291.

no tax at all, New Jersey added a proviso setting a minimum assessment of 15% of corporate net worth. The necessity of such a minimum is clear, for the statute also provides that "no franchise tax shall be imposed upon any insurance company included in this section." This tax on an assessment measured by 15% of net worth is the only New Jersey tax to which appellant, a stock insurance company created by and doing business in New Jersey, was subjected for the year in question. Thus, by the terms of the statute and in actual practice, this tax at least replaced a franchise tax. Certainly it was levied "on a legitimate subject," within the meaning of the *Tradesmens Bank* opinion. I can see no practical distinction between this New Jersey tax and a franchise tax, unless the Court is now departing from the sound principle of determining the constitutionality of a state tax "by its operation rather than by particular descriptive language which may have been applied to it." *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387. Yet only by making such a distinction constitutionally determinative can the New Jersey tax be invalidated. See *Tradesmens Bank* v. *Tax Comm'n, supra; Educational Films Corp.* v. *Ward, supra.* If New Jersey had set a minimum tax in dollars which exceeded the tax on appellant here, we could not say that the tax was an unreasonable charge for the advantages accorded appellant by the state. That the minimum tax actually enacted varies fairly with net worth, and that appellant happens to own United States bonds, should not require us to strike down this tax as unconstitutional. And there was certainly no purpose to put a heavier tax burden on appellant merely because it owned tax-exempt bonds. *Cf. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, 318.

But even under the Court's contrary reasoning on that point, I think the tax should stand. It was levied on only $75,700 worth of appellant's property. Appellant con-

ceded in its brief that its "net worth" exceeded the value of its tax-exempt federal securities by $94,936.87.[1] Thus the tax imposed on appellant did not have to touch its tax-exempt bonds. The Court's opinion acknowledges, as it must, that New Jersey "clearly . . . negatived any purpose" to include them in the tax assessment. A legislative purpose to exclude these bonds from assessment is express in the first part of the New Jersey statute. A contrary purpose in the proviso under which appellant is taxed should not be drawn by this Court when appellant's tax-exempt bonds need not be touched by the tax. The assessment of 15% of net worth leaves untaxed 85%

[1] The Court suggests that perhaps the statute should be construed as requiring liabilities other than reserves to be subtracted from net worth before the assessment is computed, in which case the excess over government bonds would be only $44,473.64. I had not understood the appellant to raise such a question in New Jersey or here, nor did I know that appellant challenged the tax as being on too low an assessment. Moreover, in discovering this supposed ambiguity in the statute the Court is supported only by the doubtful premise that the state court, in the absence of any allegation or proof that the tax levied was too small, would be required to recompute the tax itself and then either remand the case or construe the statute in such a way as to justify what may have been merely an arithmetical error. For an instance in which a state court has expressly refused to do either, see *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 319. Furthermore, such an interpretation would have absurd consequences. Under it, a company could avoid taxation completely by merely borrowing a few million dollars two days before the operative date of assessment and paying it back two days afterwards: the net worth of the company would not be altered by this transaction, but the liabilities would be increased (and the assessment accordingly reduced) by the amount of the loan obtained. As appellant concedes in its brief, subtracting liabilities from net worth (which is itself determined by subtracting liabilities from assets) would conflict with "administrative interpretation and practice." It would also conflict with the state court's statement that the tax is upon net worth. I cannot ascribe such a self-defeating interpretation to the highest court of New Jersey.

of the net worth, which more than covers the amount of the tax-exempt bonds. We cannot say that New Jersey did not intend to accomplish just this result by leaving 85% untaxed. Under these circumstances the decision in *Missouri Ins. Co.* v. *Gehner, supra,* on which the Court relies, does not bar upholding the New Jersey tax. The *Gehner* opinion recognized the power of the state to apply its tax rate to a company's net worth in excess of tax-exempt bonds.

Moreover, the New Jersey law does not discriminate against insurance companies owning government bonds. The state statute held invalid in the *Gehner* case had granted tax exemptions for statutory reserves, etc., but had deprived insurance companies of these exemptions to the extent that the companies owned tax-exempt federal bonds. This Court held such "discrimination" unconstitutional. But that holding can have no applicability to the New Jersey statute, under which federal bonds in no way deprive their owners of any state exemption. As we have pointed out, the New Jersey tax law did not increase appellant's burden merely because appellant owned tax-exempt bonds. Indeed, appellant's tax is substantially lower than if the funds invested in these bonds had been invested in non-exempt property.

I think the decision of the New Jersey court should be affirmed.

UNITED STATES *v.* ALPERS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 217. Argued December 14, 1949.—Decided February 6, 1950.

1. Obscene phonograph records are within the prohibition of § 245 of the Criminal Code, which forbids the interstate shipment of any obscene "book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character." Pp. 680–685.
2. The rule of *ejusdem generis* may not be applied when to do so would defeat the obvious purpose of the legislation. Pp. 682–683.

175 F. 2d 137, reversed.

Respondent was convicted in the District Court of violating § 245 of the Criminal Code. The Court of Appeals reversed. 175 F. 2d 137. This Court granted certiorari. 338 U. S. 813. *Reversed,* p. 685.

Joseph W. Bishop, Jr. argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Israel Convisser.*

A. J. Zirpoli submitted on brief for the respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

The question in this case is whether the shipment of obscene phonograph records in interstate commerce is prohibited by § 245 of the Criminal Code, which makes illegal the interstate shipment of any "obscene . . . book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."

Respondent was charged by an information in three counts with knowingly depositing with an express company for carriage in interstate commerce packages "containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories." Respondent, having waived jury trial, was found guilty by the District Court on two counts and was assessed a fine on each. The Court of Appeals reversed. 175 F. 2d 137. We granted certiorari to examine the applicability of § 245 of the Criminal Code to the facts of this case. 338 U. S. 813.

The pertinent provisions of the statute are as follows:

> "Whoever shall . . . knowingly deposit or cause to be deposited with any express company or other common carrier [for carriage in interstate commerce] any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." 41 Stat. 1060, 18 U. S. C. § 396, now 18 U. S. C. § 1462.

It is conceded that the phonograph records were obscene and indecent. The only question is whether they come within the prohibition of the statute.

We are aware that this is a criminal statute and must be strictly construed. This means that no offense may be created except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses. *United States* v. *Resnick,* 299 U. S. 207, 210. The most important thing to be determined is the intent of Congress. The language of the statute may not be distorted under the guise of construction, or so limited by construction as to defeat the manifest intent

of Congress. *United States* v. *Raynor,* 302 U. S. 540, 552.[1]

In interpreting the statute as applied to this case the Court of Appeals invoked the rule of *ejusdem generis.* Since the words "book, pamphlet, picture, motion-picture film, paper, letter, writing, print" appearing in the statute refer to objects comprehensible by sight only, the court construed the general words "other matter of indecent character" to be limited to matter of the same genus. The Court of Appeals held phonograph records without the statute, so interpreted, since phonograph records are comprehended by the sense of hearing.

When properly applied, the rule of *ejusdem generis* is a useful canon of construction. But it is to be resorted to not to obscure and defeat the intent and purpose of Congress, but to elucidate its words and effectuate its intent. It cannot be employed to render general words meaningless. *Mason* v. *United States,* 260 U. S. 545, 554. What is or is not a proper case for application of the rule was discussed in *Gooch* v. *United States,* 297 U. S. 124. In that case a bandit and a companion had kidnaped two police officers for the purpose of avoiding arrest and had transported them across a state line. The defendant was convicted of kidnaping under a federal statute which made it an offense to transport across state lines any person who had been kidnaped "and held for ransom or reward or otherwise." The police officers had been held not for ransom or reward but for protection, and it was contended that the words "or otherwise" did not cover the defendant's conduct, since under the rule of *ejusdem generis,* the general phrase was limited in meaning to some kind of monetary reward. This Court rejected such limiting application of the rule, saying:

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[1] See Horack, The Disintegration of Statutory Construction, 24 Ind. L. J. 335, 343–344 (1949).

> "The rule of *ejusdem generis,* while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." 297 U. S. at 128.

We think that to apply the rule of *ejusdem generis* to the present case would be "to defeat the obvious purpose of legislation." The obvious purpose of the legislation under consideration was to prevent the channels of interstate commerce from being used to disseminate any matter that, in its essential nature, communicates obscene, lewd, lascivious or filthy ideas. The statute is more fully set out in the margin.[2] It will be noted that Congress legislated with respect to a number of evils in addition to

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[2] "Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier [for carriage in interstate or foreign commerce] any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 396, now 18 U. S. C. § 1462.

those proscribed by the portion of the statute under which respondent was charged. Statutes are construed in their entire context. This is a comprehensive statute, which should not be constricted by a mechanical rule of construction.

We find nothing in the statute or its history to indicate that Congress intended to limit the applicable portion of the statute to such indecent matter as is comprehended through the sense of sight. True, this statute was amended in 1920 to include "motion-picture film." We are not persuaded that Congress, by adding motion-picture film to the specific provisions of the statute, evidenced an intent that obscene matter not specifically added was without the prohibition of the statute; nor do we think that Congress intended that only visual obscene matter was within the prohibition of the statute. The First World War gave considerable impetus to the making and distribution of motion-picture films. And in 1920 the public was considerably alarmed at the indecency of many of the films.[3] It thus appears that with respect to this amendment, Congress was preoccupied with making doubly sure that motion-picture film was within the Act, and was concerned with nothing more or less.[4]

Upon this record we could not hold, nor do we wish to be understood to hold, that the applicable portion of the statute is all-inclusive. As we have pointed out, the same statute contains other provisions relating to objects intended for an indecent or immoral use. But the portion of the statute here in issue does proscribe the dissemination of matter which, in its essential nature, com-

[3] See The Motion Picture Industry, 254 Annals of the American Academy of Political and Social Science, pp. 7–9, 140, 155, 157 (1947).

[4] H. R. Rep. No. 580, 66th Cong., 2d Sess. (1920); S. Rep. No. 528, 66th Cong., 2d Sess. (1920); 59 Cong. Rec. 2178–2179, 7162, 7297, 8280, 8334 (1920).

municates obscene ideas. We are clear therefore that obscene phonograph records are within the meaning of the Act. The judgment of the Court of Appeals is reversed, and the judgment of the District Court is affirmed.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON concur, dissenting.

I am unable to agree that the conduct of this respondent was made an offense by the language of the statutory provision on which his conviction rests. That provision forbids deposit with an express company, for interstate carriage, of "any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . . ." 18 U. S. C. § 396 (1946 ed.), now § 1462 (1948 rev.). The crime with which respondent was charged involved phonograph records, which do not come under any specific category listed in the statute. Consequently the information against respondent could only charge violation of the provision's general language barring shipment of "other matter of indecent character." The Court sustains the conviction here by reasoning that a phonograph record is "matter" within the meaning of this congressional prohibition.

Our system of justice is based on the principle that criminal statutes shall be couched in language sufficiently clear to apprise people of the precise conduct that is prohibited. Judicial interpretation deviates from this salutary principle when statutory language is expanded to include conduct that Congress might have barred, but

did not, by the language it used.[1] Compare *United States* v. *Weitzel,* 246 U. S. 533, 543, with *United States* v. *Sullivan,* 332 U. S. 689, 693–694.

The reluctance of courts to expand the coverage of criminal statutes is particularly important where, as here, the statute results in censorship. According to dictionary definitions, "matter" undeniably includes phonograph records and the substances of which they are made. Indeed, dictionaries tell us that "matter" encompasses all tangibles and many intangibles, including material treated or to be treated in a book, speech, legal action or the like; matter for discussion, argument, exposition, etc.; and material treated in the medieval metrical romances. The many meanings of "matter" are warning signals against giving the word the broad construction adopted by the Court.

History is not lacking in proof that statutes like this may readily be converted into instruments for dangerous abridgments of freedom of expression. People of varied temperaments and beliefs have always differed among themselves concerning what is "indecent." Sculpture, paintings and literature, ranked among the classics by some, deeply offend the religious and moral sensibilities of others.[2] And those which offend, however priceless or

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[1] The Government points to the legislative history of this and related statutes as proof that Congress intended its language to be most broadly construed. Particularly it relies on the argument that Anthony Comstock, a supporter and promoter of the first federal statutes in this field, had a reputation for "thoroughness in his pursuit of immorality." This may be conceded, but we cannot construe this statute on the theory that Mr. Comstock's zeal as a reformer of morals must be considered as determinative legislative history. That zeal was undoubtedly great, so great that if accepted as a criterion of construction the Court could expand the punishment along with the coverage of the Act.

[2] See *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 157–158; *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 251–252.

irreplaceable, have often been destroyed by honest zealots convinced that such destruction was necessary to preserve morality as they saw it.

Of course there is a tremendous difference between cultural treasures and the phonograph records here involved. But our decision cannot be based on that difference. Involved in this case is the vital question of whether courts should give the most expansive construction to general terms in legislation providing for censorship of publications or pictures found to be "indecent," "obscene," etc. Censorship in any field may so readily encroach on constitutionally protected liberties that courts should not add to the list of items banned by Congress.[3]

In the provision relied on, as well as elsewhere in the Act, Congress used language carefully describing a number of "indecent" articles and forbade their shipment in interstate commerce. This specific list applied censorship only to articles that people could read or see; the Court now adds to it articles capable of use to produce sounds that people can hear.[4] The judicial addi-

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[3] See discussion in 1 Chafee, Government and Mass Communications 200–366.

[4] In a second provision of the Act, Congress barred shipment of "any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use . . . ." This provision, unlike the first provision relating to pictures and written or printed matter, requires proof that the object shipped was designed, adapted or intended for indecent or immoral use.

A New York statute contains two provisions closely resembling these two provisions in the federal statute. New York Penal Law, § 1141. The New York Court of Appeals refused to sustain a conviction for selling phonograph records based on an information charging violation of the first provision of the state act, which was substantially equivalent to the federal provision here involved except that the word "matter" was modified by the phrase "written or printed." The state court did not find it necessary to determine

tion here may itself be small. But it is accomplished by a technique of broad interpretation which too often may be successfully invoked by the many people who want the law to proscribe what other people may say, write, hear, see, or read. I cannot agree to any departure from the sound practice of narrowly construing statutes which by censorship restrict liberty of communication.

Since Congress did not specifically ban the shipment of phonograph records,[5] this Court should not do so.

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whether a prosecution could have been based on the second provision, which covers "any article or instrument of indecent or immoral use." *New York* v. *Strassner*, 299 N. Y. 325, 87 N. E. 2d 280.

[5] Since the decision below, a bill has been introduced in the House of Representatives at the request of the Department of Justice to amend the statute so as to prohibit the transportation of obscene phonograph records in interstate commerce. H. R. 6622, 81st Cong., 2d Sess. In requesting this amendment, The Assistant to the Attorney General stated that whether or not the present statute applied to phonograph records was "questionable," particularly in the light of the decision below. Recalling the 1920 amendment to bring motion-picture film within the coverage of the statute, he urged that "Apparently, the time has now arrived for a further amendment to bring obscene phonograph records clearly within the scope of the present section." This proposed bill is still pending in the House Committee on the Judiciary.

UNITED STATES ET AL. v. PACIFIC COAST WHOLESALERS' ASSOCIATION ET AL.

NO. 113. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.*

Argued January 10, 1950.—Decided February 6, 1950.

An association of wholesale automobile parts dealers organized and operated in good faith, on a nonprofit basis, for the purpose of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates, *held* exempt under § 402 (c) (1) of the Interstate Commerce Act from regulation by the Interstate Commerce Commission as a freight forwarder. Pp. 690–691.

(a) The basis of the shipments—whether f. o. b. destination (or delivered price) or f. o. b. origin—is not determinative. P. 691.

81 F. Supp. 991, affirmed.

A three-judge district court set aside and enjoined enforcement of an order of the Interstate Commerce Commission requiring the appellee in No. 113 to discontinue operations as a freight forwarder without a permit from the Commission. 81 F. Supp. 991. On appeal to this Court, *affirmed,* p. 691.

J. Roger Wollenberg argued the cause for the United States and the Interstate Commerce Commission, appellants in No. 113. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson* and *Daniel W. Knowlton. H. L. Underwood* was also of counsel.

Harry C. Ames argued the cause and filed a brief for the Freight Forwarders Institute, appellant in No. 114.

Hugh Gordon and *Wyman C. Knapp* were on a brief for the Pacific Coast Wholesalers' Association et al., appellees.

*Together with No. 114, *Freight Forwarders Institute* v. *Pacific Coast Wholesalers' Association et al.,* also on appeal from the same court.

PER CURIAM.

The appellee, Pacific Coast Wholesalers' Association, was formed by seven Los Angeles auto parts dealers in 1935; incorporated under California law as a nonprofit corporation in 1943; and had forty-one members and issued freight bills exceeding one million dollars in annual value in 1945. The issue presented is whether this association, with respect to the shipments here involved, is subject to regulation by the Interstate Commerce Commission as a freight forwarder or stands in exempt status under § 402 (c) (1) of the Interstate Commerce Act. This section reads as follows:

> "The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, ..." [1]

The Interstate Commerce Commission, in 1945, considered the status of the appellee in its first decision in this matter. At that time, it concluded that "It has been established in this proceeding that the traffic handled is for members of the association, that the association was founded and has been operated, in good faith, for the purpose of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates, and that the association is operated on a nonprofit basis. These are operations of the character contemplated by the exemption referred to, and may be continued without obtaining authority therefor from this Commission." 264 I. C. C. 134, 142.

In 1947, the Commission reversed its position as it applied to shipments on an f. o. b. destination or delivered

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[1] 56 Stat. 285, 49 U. S. C. § 1002 (c) (1).

price basis. 269 I. C. C. 504. It left standing the exemption of the association from regulation by the Commission in respect of shipments on an f. o. b. origin basis. It was stated that the legal obligation to pay the freight charges rested on the nonmember consignor, who paid the full less-than-carload rate, rather than on the consignee association member. It was therefore held that the difference between the rate paid by the nonmember and the carload transportation cost was profit to the association, and that the association was holding out its service to the general public. In this view, the Commission concluded that appellee was not qualified for the exempt status on f. o. b. destination or delivered price shipments.

A decree of the three-judge district court set aside the Commission's order as without rational basis. 81 F. Supp. 991. The court considered as decisive that no shipments by the association were ever undertaken except at the behest and for the benefit of a member. Looking to the agency between member and association, rather than that between buyer and seller, the court saw no reasonable ground for ruling that the association was on a profit basis, or that it was holding its service out to the general public. We agree.

There is nothing in the language of the Act or the legislative history to suggest that Congress intended the exemption to turn on the type of shipment which was involved, whether f. o. b. origin or f. o. b. destination (delivered price). On the contrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative. Under that test, the valid claim of the association to the statutory exemption is established by the original Commission decision. The judgment below is

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

UNITED STATES *v.* BENEDICT ET AL., TRUSTEES, ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 45. Argued November 8, 1949.—Decided February 13, 1950.

In 1944, trustees permanently set aside a charitable contribution from gains realized upon the disposition of capital assets held in the trust for more than six months. Pursuant to § 117 (b) of the Internal Revenue Code, they treated only 50% of these capital gains as income in computing the income of the trust. *Held:* Under § 162 (a), only 50% of the charitable contribution (the proportionate part attributable to the taxable part of the capital gains) could be deducted in computing the federal income tax of the trust. Pp. 692–699.

112 Ct. Cl. 550, 81 F. Supp. 717, reversed.

The Court of Claims awarded respondents a judgment for a refund of income taxes. 112 Ct. Cl. 550, 81 F. Supp. 717. This Court granted certiorari. 336 U. S. 966. *Reversed,* p. 699.

Arnold Raum argued the cause for the United States. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Helen Goodner* filed a brief for the United States.

Theodore Pearson argued the cause for respondents. With him on the brief was *John W. Drye, Jr.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question presented is whether trustees, who, in 1944, permanently set aside a charitable contribution from gains realized upon the disposition of capital assets held for more than six months, were entitled, in computing the federal income tax of the trust, to deduct the full amount

of the contribution,[1] although only half of those gains were taken into account in computing net income.[2] For the reasons hereafter stated, our answer is in the negative.

The respondents are trustees of a trust created by the will of John E. Andrus. The will directs that the net income of the trust be divided into 100 parts, 55 to be paid to certain individual beneficiaries and 45 to the Surdna Foundation, Inc., a charitable corporation.[3] Pur-

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[1] "SEC. 162. NET INCOME.

"The *net income of the estate or trust* shall be computed in the same manner and on the same basis as in the case of an individual, *except that*—

"(a) *There shall be allowed as a deduction* (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) *any part of the gross income, without limitation,* which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; . . . ." (Emphasis supplied.) 53 Stat. 66, 26 U. S. C. § 162 (a).

[2] "SEC. 117. CAPITAL GAINS AND LOSSES.

. . . . . .

"(b) PERCENTAGE TAKEN INTO ACCOUNT.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

"100 per centum if the capital asset has been held for not more than 6 months;

"50 per centum if the capital asset has been held for more than 6 months." 53 Stat. 50–51, as amended, 56 Stat. 843, 26 U. S. C. § 117 (b).

[3] The will creating the trust contained no provision as to the kind of income from which the charitable contributions were to be set aside, and it is not disputed that the trustees properly set aside the

suant to those terms the trustees permanently set aside for the Foundation 45% of the trust's net income for the fiscal year ended April 30, 1944, the period involved in this case.

In their fiduciary tax return, the trustees reported ordinary net income of $240,567.73, and deducted from it, as a charitable contribution, the $108,255.48 (45% of that net income) which they had set aside for the Surdna Foundation. This was done under § 162 (a) of the Internal Revenue Code.[4] The trustees also reported gains of $60,374.01 on the disposition of capital assets held for more than six months. Of these gains, they took into account only 50%, amounting to $30,187.01, in computing the trust's taxable income. This was done under § 117 (b).[5] An uncontroverted deduction of $329.60, representing the carry-over of a 1942 loss, reduced this amount to $29,857.41. From this the trustees deducted 45%, representing a proportionate share of the trust's contribution to the Surdna Foundation. This deduction amounted to $13,435.83, leaving a taxable net income of $16,421.58, on which a tax of $5,480.35 was paid, plus interest.

In 1947 the trustees filed a claim for a refund of $5,157.41. They based their claim upon a 1946 decision

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contributions proportionately from capital gains and all other income. There is nothing to indicate that the trustees, in setting aside the contribution, attempted to allocate them to any particular part or percentage of the capital gains. See *Helvering* v. *Bliss*, 293 U. S. 144, 149–150; *Grey* v. *Commissioner*, 118 F. 2d 153 (C. A. 7th Cir., affirming 41 B. T. A. 234); *Scott* v. *United States*, 111 Ct. Cl. 610, 618–620, 78 F. Supp. 811, 815–816; *Newbury* v. *United States*, 102 Ct. Cl. 192, 57 F. Supp. 168; *Meissner* v. *Commissioner*, 8 T. C. 780; *Estate of Traiser* v. *Commissioner*, 41 B. T. A. 228; Montgomery, Federal Taxes, Estates, Trusts and Gifts 179 (1948–1949); 2 Nossaman, Trust Administration and Taxation 115–116 (1945).

[4] See note 1, *supra*.

[5] See note 2, *supra*.

of the Tax Court as to the 1941 taxes of a nearly identical trust. *Andrus Trust No. 1* v. *Commissioner*, 7 T. C. 573. On that basis, the trustees claimed a deduction from the aforesaid $29,857.41, not only of a proportionate share of the contribution which the trust had set aside from capital gains, but of the entire amount of that contribution. This increased that deduction from $13,435.83 (45% of $29,857.41) to $27,168.31 (45% of the total capital gains of $60,374.01), and correspondingly reduced the trust's taxable net income from $16,421.58 to $2,689.10.

In July, 1947, the Court of Appeals for the Second Circuit unanimously reversed the Tax Court in the case relating to 1941 taxes. *Commissioner* v. *Central Hanover Bank Co.*, 163 F. 2d 208, cert. denied, November, 1947, 332 U. S. 830. The Commissioner, however, took no action on the trustees' claim for a refund relating to 1944 taxes, and, in 1948, the trustees filed this proceeding for its recovery through the Court of Claims. With one judge dissenting, that court decided in their favor. 112 Ct. Cl. 550, 81 F. Supp. 717. To resolve the resulting conflict, we granted certiorari. 336 U. S. 966.

An illustration based upon the facts in the instant case will bring the statutory problem into clearer focus. A trust realizes gains of $60,000 during the tax year from the sale of capital assets held for more than six months. From these it makes a charitable contribution of 50%. Section 162 (a) of the Code [6] provides that a trust may deduct any part of its "gross income" which it contributes to such a charity as the one selected. Section 117 (b)[7] provides that only 50% of such gains shall be taken into account in computing net income.

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[6] See note 1, *supra*.

[7] See note 2, *supra*.

The trustees contend that, for tax purposes, the entire $60,000 is "gross income," that from this amount the $30,000 charitable contribution may be deducted under § 162 (a), and that the entire remaining $30,000 is to be left out of account by force of § 117 (b), thereby leaving no taxable net income, although $30,000 goes to individual beneficiaries. The Commissioner, however, contends that only the $30,000 of the recognized capital gains that is taken into account by force of § 117 (b) constitutes "gross income," and that necessarily the other $30,000 that is not to be taken into account for tax purposes is not "gross income." Beginning, thus, with $30,000 of gross income, the Commissioner allows a deduction from it of that proportionate part of the charitable contribution that is attributable to the half of the recognized capital gains which has been taken into account. That deduction amounts to $15,000, leaving a taxable net income of $15,000.

The narrow statutory question thus presented is whether the entire recognized capital gains or only that half taken into account under § 117 (b) shall constitute gross income for tax purposes. Stated conversely, the question is whether that half of a taxpayer's recognized capital gains that is not taken into account for tax purposes shall be left out of account by way of its initial exclusion from gross income, or by way of its subsequent deduction from gross income. On this precise question the Code is silent. No provision of the Code and nothing in the legislative history or administrative practice expressly settles the course to be followed. We, therefore, seek the purposes of the applicable sections of the Code and adopt that construction which best gives effect to those purposes.

We find that the obvious purpose of § 162 (a) is to encourage the making of charitable contributions out of

the gross income of a trust and, to that end, it completely exempts such contributions from income tax, without the limitations imposed upon charitable contributions made by individuals or corporations.[8] This purpose is served by each of the constructions of the Code suggested by the parties. Under either method of computation the beneficiaries of the charitable contribution will receive it in full and free of tax.

We then find that the effect of § 117 (b) is to tax recognized capital gains like ordinary income, except that the tax on capital gains held for more than six months is to be computed on 50% of the amount on which it would be computed if those gains were ordinary income. The Commissioner's solution accomplishes precisely that result and thus serves that purpose. In the illustration, if the gains were ordinary income, the amount subject to tax, after the deduction of the charitable contribution, would be $30,000. As it is, the amount subject to tax is $15,000. The trustees' construction in the instant case

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[8] *United States* v. *Pleasants,* 305 U. S. 357, 363; *Old Colony Trust Co.* v. *Commissioner,* 301 U. S. 379, 384; *Helvering* v. *Bliss,* 293 U. S. 144, 147.

When the words "without limitation," in § 162 (a), are read in connection with § 23 (o), 53 Stat. 12, 14–15, as amended, 53 Stat. 880, and 56 Stat. 826, 26 U. S. C. § 23 (o), their effect is only to make inapplicable the limitation of 15%, under § 23 (o), and any other statutory limitation which otherwise might apply to charitable contributions made out of the gross income of an estate or trust. *Grey* v. *Commissioner,* 41 B. T. A. 234, 243, aff'd, 118 F. 2d 153. See also, *Old Colony Trust Co.* v. *Commissioner,* 301 U. S. 379, 382–384; *Commissioner* v. *Central Hanover Bank Co.,* 163 F. 2d 208, 211 (C. A. 2d Cir.); *Frank Trust of 1931* v. *Commissioner,* 145 F. 2d 411, 413 (C. A. 3d Cir.); *Scott* v. *United States,* 111 Ct. Cl. 610, 618–620, 78 F. Supp. 811, 815–816; *Newbury* v. *United States,* 102 Ct. Cl. 192, 57 F. Supp. 168. For the comparable 5% limitation applicable to charitable contributions made by corporations, see 53 Stat. 15–16, as amended, 56 Stat. 822, 26 U. S. C. § 23 (q).

would result in taxing the capital gains at substantially less than 50% of the amount at which they would be taxed if they were ordinary income. To the extent that the amount subject to tax goes below that percentage, it fails to give effect to the purpose of § 117 (b).[9] In the more extreme circumstances suggested by the illustration, this construction would entirely eliminate the tax.

We, therefore, approve that interpretation of § 117 (b) and the definition of statutory gross income adopted by the Commissioner. We treat the words in § 117 (b), which state that only 50% of certain recognized capital gains "shall be taken into account in computing . . . net income," as applying to the entire computation of the tax, beginning with the statement of the gross income of the trust and concluding with its taxable net income.[10] We treat that percentage of capital gains which expressly

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[9] See note 2, *supra*. The alternative computation of the tax on capital gains provided by § 117 (c) (2) of the Code is consistent with this result. 53 Stat. 51, as amended, 56 Stat. 843–844, 26 U. S. C. § 117 (c) (2).

[10] It is unnecessary to review the intricate arguments presented as to the terminology of the Code. They do not compel the adoption of either interpretation or preclude the conclusion here reached. This is not a case in which the trust or the statute has required or even authorized the trustees to earmark their charitable contributions as coming from any particular items of trust income, or from any particular kind of trust income. The issue does not involve any possible allocation of a charitable deduction to ordinary income rather than to capital gains.

For the requirement that, under § 162 (a), each contribution in order to be deductible must be made or permanently set aside pursuant to the terms of the will or deed creating the trust, and also must be from a part of the gross income of the trust, see *Old Colony Trust Co.* v. *Commissioner,* 301 U. S. 379; *Frank Trust of 1931* v. *Commissioner,* 145 F. 2d 411 (C. A. 3d Cir.); *Wellman* v. *Welch,* 99 F. 2d 75 (C. A. 1st Cir.); *Estate of Tyler* v. *Commissioner,* 9 B. T. A. 255, 262–263.

is not to be taken into account in computing taxable net income as also excluded from statutory gross income.[11]

Accordingly, the acceptance by the Commissioner of the original return is approved and the judgment of the Court of Claims is

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE JACKSON are of the opinion that the judgment of the Court of Claims should be affirmed for the reasons which it gave.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER.

The contrariety of views expressed by the Tax Court, the Court of Appeals for the Second Circuit, the Court of Claims and now by this Court in the task of harmonizing §§ 22 (a), 117 (b) and 162 (a) of the Internal Revenue Code conclusively proves the opaqueness, if not inherent incongruity, of those provisions. Courts must do the best they can with such materials since the power to write or rewrite legislation is not theirs. But the fact that a taxpayer may astutely apply his income so as to reduce the net base on which a tax is to be levied is not in itself ground for rejecting a construction of the Revenue Code which permits the reduced base, even though the particular mode of distributing his income may not have been contemplated in the enactment of the classes of exemptions and deductions within which the taxpayer brings himself. I, too, recoil from a bizarre

[11] See *Commissioner* v. *Central Hanover Bank Co.*, 163 F. 2d 208, 210; *Frank Trust of 1931* v. *Commissioner, supra; Wellman* v. *Welch, supra; Green* v. *Commissioner,* 7 T. C. 263, 277; *Maloy* v. *Commissioner,* 45 B. T. A. 1104, 1107.

result and if legislation is ambiguous its construction should avoid such a result. But the rationale of construction ought not to be based on the impact of a single bizarre instance.

A deduction for trust income applied to charitable purposes should not be disallowed merely because one taxpayer can effect the payment of a lower income tax than another through the mode by which the charitable contribution is made. Thus, where the trust instrument provides that all charitable donations shall be allocated from ordinary income and not from capital gains, the taxpayer may doubtless deduct such charitable contributions in full and may at the same time report any capital gains under the special capital gains provisions of the Code. This would secure the very benefits sought by the taxpayers here. The rule enunciated by the Court may therefore itself rest tax liability on the astuteness shown in drawing the trust instrument allocating income for charitable purposes.

Since I am not alone in entertaining these doubts and they have not been dispelled, it seems appropriate to express them.

EDITORIAL NOTE.

The next page is purposely numbered 801. The numbers from 700 to 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM BEGINNING OF OCTOBER TERM, 1949, THROUGH DECEMBER 8, 1949.*

Case Dismissed in Vacation.

No. 72. Telefilm, Inc. *v.* Superior Court of California, in and for the County of Los Angeles, et al. On petition for writ of certiorari to the Supreme Court of California. September 16, 1949. Dismissed in vacation pursuant to Rule 35 of the Rules of this Court. *Joseph L. Lewinson* for petitioner. *Harold W. Kennedy* and *Eugene D. Williams* for respondents. Reported below: 33 Cal. 2d 289, 201 P. 2d 811.

October 10, 1949.

Per Curiam Decisions.

No. 89. Eastern Steamship Lines, Inc. *v.* Mulligan, Public Administrator. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for disposition in the light of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783. *Arthur M. Boal* for petitioner. *George J. Engelman* for respondent. Reported below: 170 F. 2d 882.

No. 103. Estate of Schroeder et al. *v.* Commissioner of Internal Revenue. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The petition for writ of

*For decisions *per curiam* and orders announced on June 27, 1949, see 337 U. S. 951 *et seq.*

certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for further consideration in the light of T. D. 5741, 14 Fed. Reg. 5536, and *Commissioner* v. *Estate of Church*, 335 U. S. 632, and *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701. *Thomas Raeburn White* and *George B. Francis* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Arnold Raum, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 172 F. 2d 864. [This order amended, *post*, p. 884.]

No. 104. ADIRONDACK TRANSIT LINES, INC. *v.* HUDSON TRANSIT LINES, INC.; and

No. 105. UNITED STATES ET AL. *v.* HUDSON TRANSIT LINES, INC. Appeals from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS dissent. *Martin J. Kelly, Jr.* for appellant in No. 104. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellants in No. 105. *Samuel Weiss* and *James F. X. O'Brien* for appellee. Reported below: 82 F. Supp. 153.

No. 122. BALL, TRUSTEE, *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Joseph W. Henderson* and *George M. Brodhead* for appellant. *Solicitor General Perlman* for the United States; and *Albert C. Bickford, Louis Phillips* and *George G. Gallantz* for Paramount Pictures, Inc. et al., appellees.

No. 134. BEEMAN ET AL. *v.* MICHIGAN BOARD OF PHARMACY ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Raymond K. Dykema* for appellants. *Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *Ernest O. Zirkalos* and *Daniel J. O'Hara,* Assistant Attorneys General, for appellees. Reported below: 323 Mich. 390, 35 N. W. 2d 354.

No. 137. BEARD-LANEY, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of South Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Edward W. Mullins* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States et al.; and *C. W. Tillett* and *Joseph W. Blackshear* for the Associated Petroleum Carriers, appellees. Reported below: 83 F. Supp. 27.

No. 138. LEE *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *J. B. Stirling* for appellant. Reported below: 203 Miss. 264, 34 So. 2d 736.

No. 148. HASS *v.* NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Emanuel Redfield* for appellant. Reported below: 299 N. Y. 681, 87 N. E. 2d 68.

No. 175. PARTMAR CORPORATION *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Russell Hardy* for appellant. *Solicitor General Perlman* for the United States; and *Albert C. Bickford, Louis Phillips* and *George G. Gallantz* for Paramount Pictures, Inc. et al., appellees.

No. 196. GENERAL ENGINEERING CORP. ET AL. *v.* TEXAS EMPLOYMENT COMMISSION (FORMERLY KNOWN AS TEXAS UNEMPLOYMENT COMPENSATION COMMISSION) ET AL. Appeal from the Supreme Court of Texas. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *A. C. Heath* for appellants. *Price Daniel,* Attorney General of Texas, for appellees. Reported below: 147 Tex. 503, 217 S. W. 2d 659.

No. 198. KRACHOCK *v.* DEPARTMENT OF REVENUE. Appeal from the Supreme Court of Illinois. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Harry G. Fins* and *Walter F. Dodd* for appellant.. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines* and *A. Zola Groves,* Assistant Attorneys General, for appellee. Reported below: 403 Ill. 148, 85 N. E. 2d 682.

No. 199. WALSH, SHERIFF, *v.* UNITED STATES EX REL. WHITE. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to discharge the writ of habeas corpus and remand the re-

spondent to custody. *John S. Boyle* for petitioner. *Joseph I. Bulger* and *Ode L. Rankin* for respondent. Reported below: 174 F. 2d 49.

No. 238. McGee *v.* Mississippi. Appeal from and petition for writ of certiorari to the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. Mr. Justice Douglas took no part in the consideration or decision of this case. *Arthur G. Silverman* for appellant-petitioner. *Greek L. Rice,* Attorney General of Mississippi, and *George H. Ethridge,* Assistant Attorney General, for appellee-respondent. Reported below: 40 So. 2d 160.

No. 242. Kenosha Motor Coach Lines, Inc. *v.* Public Service Commission et al. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. Mr. Justice Black and Mr. Justice Douglas dissent. *Adolph J. Bieberstein* and *R. M. Rieser* for appellant. *Thomas E. Fairchild,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General, and *T. H. Spence* for appellees. Reported below: 254 Wis. 509, 37 N. W. 2d 78.

No. 245. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints *v.* City of Porterville et al. Appeal from the District Court of Appeal, 4th Appellate District, of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *W. Glenn Harmon* for appellant. *Leon Thomas David* for appellees. Reported below: 90 Cal. App. 2d 656, 203 P. 2d 823.

No. 250. BINGAMAN, ADMINISTRATOR, *v.* REHN ET AL., DOING BUSINESS AS JOHN P. MAINELLI CONSTRUCTION CO. Appeal from the Supreme Court of Nebraska. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *C. Dell Floyd* for appellant. *Edward K. McDermott* for Rehn, appellee. Reported below: 151 Neb. 196, 36 N. W. 2d 856.

No. 277. REMMER *v.* MUNICIPAL COURT OF THE CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.; and

No. 278. MENLO SOCIAL CLUB, INC. *v.* BROWN, DISTRICT ATTORNEY, ET AL. Appeals from the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *Simeon E. Sheffey* for appellants. *Fred N. Howser,* Attorney General of California, and *Clarence A. Linn,* Deputy Attorney General, for appellees. Reported below: 90 Cal. App. 2d 854, 204 P. 2d 92.

Miscellaneous Orders.

No. 12, Original. UNITED STATES *v.* LOUISIANA. The demurrer is overruled and the motion to dismiss on jurisdictional grounds, and conditional motions are denied. The motion for judgment is denied and the defendant is allowed thirty days from this date within which to file an answer to the complaint. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of these questions. *Attorney General McGrath* and *Solicitor General Perlman* for the United States. *Bolivar E. Kemp, Jr.,* Attorney General, *John L. Madden,* Assistant Attorney General, *L. H. Perez* and *F. Trowbridge vom Baur* for the State of Louisiana.

No. 13, Original. UNITED STATES *v.* TEXAS. The motion to dismiss the complaint is denied. The motion for

more definite statement or bill of particulars is denied. The motion for judgment is denied and the defendant is allowed thirty days from this date within which to file an answer to the complaint. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of these questions. *Attorney General McGrath* and *Solicitor General Perlman* for the United States. *Price Daniel,* Attorney General, *J. Chrys Dougherty, Jesse P. Luton, Jr.* and *K. Bert Watson,* Assistant Attorneys General, for the State of Texas.

No. 12, Original. UNITED STATES *v.* LOUISIANA; and

No. 13, Original. UNITED STATES *v.* TEXAS. The motion of Agnes E. Lewis et al. for leave to intervene is denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 2, Misc. ROBERTS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. It is ordered that Max Radin, Esquire, of Berkeley, California, a member of the bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 11. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* MANUFACTURERS TRUST CO.;

No. 15. MANUFACTURERS TRUST CO. *v.* CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN; and

No. 48. SAVORGNAN *v.* UNITED STATES ET AL. McGrath, present Attorney General, substituted as a party in these cases for Clark. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 27. SECRETARY OF AGRICULTURE *v.* CENTRAL ROIG REFINING CO. ET AL.;

No. 30. PORTO RICAN AMERICAN SUGAR REFINERY, INC. *v.* CENTRAL ROIG REFINING CO. ET AL.; and

No. 32. GOVERNMENT OF PUERTO RICO *v.* SECRETARY OF AGRICULTURE ET AL. The motion to withdraw the appearances of Howard C. Westwood and Donald Hiss as counsel for American Sugar Refining Co. et al. is granted.

No. 213. UNITED STATES EX REL. LEE WO SHING *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. Shaughnessy, Acting District Director, substituted as the party respondent. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 2, October Term, 1941. BERNARDS ET AL. *v.* JOHNSON ET AL., 314 U. S. 19. The motion to recall the mandate is denied.

No. 279, October Term, 1948. STANDARD OIL COMPANY OF CALIFORNIA ET AL. *v.* UNITED STATES, 337 U. S. 293. It is ordered that the first sentence of the first paragraph on page 19 of the slip opinion, which begins "In this connection it is significant that the qualifying language was . . ." be, and it is hereby amended to read as follows: "In this connection it is significant that the qualifying language was not added until after the House and Senate bills reached Conference." The petition for rehearing is denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

[The opinion is reported as amended in the bound volume of 337 U. S. 293, the change being at p. 312.]

No. 100, Misc. WEBER *v.* RAGEN, WARDEN. The petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit is dismissed. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Petitioner *pro se*. *Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 176 F. 2d 579.

No. 9, Misc. PERRY *v.* STEELE, WARDEN;
No. 13, Misc. NELSON *v.* RAGEN, WARDEN;
No. 17, Misc. HENDREN *v.* LAINSON, WARDEN;
No. 33, Misc. RICHARDSON *v.* PENNSYLVANIA;
No. 65, Misc. WILSON *v.* VICE, U. S. MARSHAL, ET AL.;
No. 83, Misc. EX PARTE NEWSTEAD;
No. 104, Misc. IN RE HOLMES; and
No. 122, Misc. HATFIELD *v.* FRISBIE, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 29, Misc. SEREN *v.* RAGEN, WARDEN. Motion for leave to file petition for writ of certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 34, Misc. SCHUBLE *v.* SWYGERT, U. S. DISTRICT JUDGE. The motion for leave to file petition for writ of mandamus is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 39, Misc. ILLINOIS EX REL. STERBA *v.* FULTON ET AL. The motion for leave to file petition for writ of mandamus and for other relief is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 56, Misc. O'NEILL *v.* ROBINSON, WARDEN. The motion for leave to file petition for writ of certiorari is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 109, Misc. IN RE HENCE ET AL. Application denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

Certiorari Granted. (*See also Nos. 89, 103 and 199, supra.*)

No. 60. KRUG *v.* SHERIDAN-WYOMING COAL CO., INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioner. *T. Peter Ansberry, Stephen J. McMahon, Jr.* and *Seth W. Richardson* for respondent. Reported below: 84 U. S. App. D. C. 288, 172 F. 2d 282.

No. 96. POWELL ET AL. *v.* UNITED STATES CARTRIDGE CO. C. A. 8th Cir. Certiorari granted. *Thomas Bond* for petitioners. *William L. Marbury* for respondent. *Solicitor General Perlman* and *William S. Tyson* filed a brief for the United States, as *amicus curiae,* supporting the petition. Reported below: 174 F. 2d 718.

No. 97. UNITED STATES *v.* MOORMAN ET AL., DOING BUSINESS AS J. W. MOORMAN & SON. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *F. A. Bodovitz* for respondents. Reported below: 113 Ct. Cl. 159, 82 F. Supp. 1010.

No. 126. COMMISSIONER OF INTERNAL REVENUE *v.* PHILADELPHIA TRANSPORTATION CO. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *William R. Spofford, Frederic L. Ballard* and *Sherwin T. McDowell* for respondent. Reported below: 174 F. 2d 255.

No. 150. DICKINSON *v.* PETROLEUM CONVERSION CORP. C. A. 2d Cir. Certiorari granted limited to questions 1 and 2 presented by the petition for the writ, *i. e.:*

"1. Where two rival claimants each sought the recovery of a particular sum from other parties to the action, and judgment after trial, entered in 1947, dismissed on the merits one of said claims and granted recovery in a fixed amount to the other claimant, a spurious class,* and provided for judgment apportioning said recovery to members of the class after opportunity to absent members to intervene and claim their respective shares, and all other issues in the action were disposed of by said 1947 judgment, and the unsuccessful claimant failed to appeal therefrom within the statutory period, is its receiver in bankruptcy nevertheless entitled to a review of said 1947 judgment, dismissing its claim on the merits, by an appeal from the 1948 judgment apportioning the recovery to members of the class constituting the successful claimant?

"2. Where a corporation intervenes in an action and pleads a claim against the plaintiff and one of the defendants for a particular sum of money based upon breach of fiduciary obligation, and representatives of subscribers to the stock of said corporation simultaneously intervene and assert a claim for the same amount on behalf of the class on the ground that the sum sought came out of funds belonging to said class, alleging, however, that either said class or the corporation was entitled to the recovery, and the action is tried on behalf of both the corporation and the class by a single counsel, the attorney for the corporation, and at the end of the trial both submitted a single brief and a single set of proposed findings and conclusions of law, both leaving it to the trial court to decide whether, if a recovery was to be had, to which of said claimants it should be awarded, and the decree, dismissing the claim of

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"*Rule 23 (a) (3), Federal Rules of Civil Procedure."

the corporation on the merits and sustaining the claim of the class and fixing the total recovery thereon, was entered on the joint motion of the attorney for the corporation and the attorney for the class, and the attorney for the class was an officer of and an attorney for the corporation, should the Court of Appeals have dismissed the appeal seeking review of said decree on behalf of the corporation by its receiver in bankruptcy, on the ground that the decree was a consent decree, it appearing that both the corporation and the class had asserted and prosecuted their claims and jointly entered said decree on the basis that it was satisfactory to both if either recovered?"

Solomon Kaufman and *Samuel Hershenstein* for petitioner. *Harry J. Pasternak* for respondent. Reported below: 173 F. 2d 738.

No. 154. WONG YANG SUNG *v.* CLARK, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. McGrath, present Attorney General, substituted as a party respondent for Clark. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Jack Wasserman, Gaspare Cusumano* and *Thomas M. Cooley, II,* for petitioner. *Solicitor General Perlman* for respondents. Reported below: 84 U. S. App. D. C. 419, 174 F. 2d 158.

No. 157. CIVIL AERONAUTICS BOARD *v.* STATE AIRLINES, INC.;

No. 158. STATE AIRLINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL.; and

No. 159. PIEDMONT AVIATION, INC. *v.* STATE AIRLINES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* and *Emory T. Nunneley, Jr.* for petitioner in No. 157, and on a brief in No. 159 for

the Civil Aeronautics Board, as *amicus curiae,* supporting the petition. *Frederick W. P. Lorenzen* and *Philip Schleit* for State Airlines, Inc., petitioner in No. 158 and respondent in Nos. 157 and 159. *Charles H. Murchison* for Piedmont Aviation, Inc., petitioner in No. 159 and respondent in No. 158. Reported below: 84 U. S. App. D. C. 374, 174 F. 2d 510.

No. 178. Bryan *v.* United States. C. A. 5th Cir. Certiorari granted. *Alston Cockrell* and *Carl J. Batter* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney, Ellis N. Slack* and *Andrew F. Oehmann* for the United States. Reported below: 175 F. 2d 223.

No. 200. Affolder *v.* New York, Chicago & St. Louis Railroad Co. C. A. 8th Cir. Certiorari granted. *Mark D. Eagleton* and *Wm. H. Allen* for petitioner. *Lon Hocker, Jr.* for respondent. Reported below: 174 F. 2d 486.

No. 217. United States *v.* Alpers. C. A. 9th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *A. J. Zirpoli* for respondent. Reported below: 175 F. 2d 137.

No. 230. Swift & Company Packers et al. *v.* Compania Colombiana Del Caribe, S. A. C. A. 5th Cir. Certiorari granted. *Eberhard P. Deutsch* for petitioners. *George C. Sprague* for respondent. Reported below: 175 F. 2d 513.

No. 271. Alcoa Steamship Co., Inc. *v.* United States. C. A. 2d Cir. Certiorari granted. *Melville J. France* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade*

for the United States. Briefs of *amici curiae* supporting the petition were filed by *L. de Grove Potter* for the Waterman Steamship Corp., and *Harold S. Deming* for the Stockard Steamship Corp. Reported below: 175 F. 2d 661.

No. 50, Misc. HUBSCH *v.* UNITED STATES; and

No. 51, Misc. SCHWEITZER *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Morris Berick* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 174 F. 2d 7.

Certiorari Denied. (*See also supra, Nos. 138 and 238 and Misc. Nos. 29 and 56.*)

No. 52. ALESNA ET AL. *v.* RICE, U. S. CIRCUIT COURT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. *Herbert Resner* for petitioners. *Walter D. Ackerman, Jr.*, Attorney General of Hawaii, *Rhoda V. Lewis*, Assistant Attorney General, *Michiro Watanabe*, Deputy Attorney General, and *Thomas W. Flynn* for respondents. Reported below: 172 F. 2d 176.

No. 64. BREEDING MOTOR FREIGHT LINES, INC. *v.* RECONSTRUCTION FINANCE CORP. ET AL.;

No. 65. BREEDING MOTOR COACHES, INC. *v.* RECONSTRUCTION FINANCE CORP. ET AL.; and

Nos. 66 and 67. BREEDING ET AL., DOING BUSINESS AS BREEDING MOTOR COACHES, ET AL. *v.* RECONSTRUCTION FINANCE CORP. C. A. 10th Cir. Certiorari denied. *John B. Dudley* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Joseph Kovner* for the Reconstruction Finance Corporation, respondent. Reported below: 172 F. 2d 416.

No. 68. BANNING *v.* DETROIT, TOLEDO & IRONTON RAILROAD CO.; and

No. 93. DETROIT, TOLEDO & IRONTON RAILROAD CO. *v.* BANNING. C. A. 6th Cir. Certiorari denied. *Lloyd T. Bailey* for petitioner in No. 68 and respondent in No. 93. *Clifford B. Longley* for petitioner in No. 93 and respondent in No. 68. Reported below: 173 F. 2d 752.

No. 73. GROSS ET AL. *v.* KELL ET AL. C. A. 5th Cir. Certiorari denied. *George S. Wright* for petitioners. Reported below: 171 F. 2d 715.

No. 74. VESPOLE *v.* UNITED STATES; and

No. 5, Misc. TANUZZO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *J. Bertram Wegman* for petitioner in No. 74. Petitioners *pro se* in No. 5, Misc. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 174 F. 2d 177.

No. 78. GOOD HOLDING CO. ET AL. *v.* BOSWELL. C. A. 5th Cir. Certiorari denied. *John Sirica* and *E. F. P. Brigham* for petitioners. *Morris Berick* for respondent. Reported below: 173 F. 2d 395.

No. 80. HODGE ET AL. *v.* FIRST PRESBYTERIAN CHURCH. Supreme Court of Iowa. Certiorari denied. *J. J. Ludens* for petitioners. *Carl E. Sheldon* and *Philip H. Ward* for respondent. Reported below: 240 Iowa 431, 35 N. W. 2d 658.

No. 81. DELAHANTY ET AL., TRADING AS P. J. DELAHANTY MANUFACTURING CO., *v.* DALEY. Supreme Court of New Jersey. Certiorari denied. *Milton T. Lasher* for petitioners. *Lionel P. Kristeller* for respondent. Reported below: 1 N. J. 492, 64 A. 2d 340.

No. 84. AERO SERVICES, INC. *v.* QUINN, COUNTY ASSESSOR, ET AL. C. A. 9th Cir. Certiorari denied. *Martin Gendel* for petitioner. *Harold W. Kennedy* for respondents. Reported below: 172 F. 2d 157.

No. 85. HARP, DOING BUSINESS AS O. G. HARP POULTRY & EGG CO., *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Mark Goode* for petitioner. *Solicitor General Perlman, William S. Tyson* and *Bessie Margolin* for the United States. Reported below: 173 F. 2d 761.

No. 86. BATTEN, BARTON, DURSTINE & OSBORN, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Arthur M. Boal* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 171 F. 2d 474.

No. 87. HOAGLAND *v.* BASS. C. A. 5th Cir. Certiorari denied. *Wiley Johnson* for petitioner. *Roland Boyd* for respondent. Reported below: 172 F. 2d 205.

No. 88. BAILEY *v.* BASS. C. A. 5th Cir. Certiorari denied. *Wiley Johnson* for petitioner. *Roland Boyd* for respondent. Reported below: 172 F. 2d 212.

No. 90. ZARICHNY *v.* STATE BOARD OF AGRICULTURE ET AL. Supreme Court of Michigan. Certiorari denied. *G. Leslie Field* for petitioner. *Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Clayton F. Jennings* for respondents.

No. 94. JACKSON *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 95. HARRIS TRUST & SAVINGS BANK, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Carroll J. Lord, Leland K. Neeves* and

Jess Halsted for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Hilbert P. Zarky* for respondent. Reported below: 172 F. 2d 605.

No. 106. DOYLE ET AL. *v.* LORD BALTIMORE HOTEL CO. ET AL. Court of Appeals of Maryland. Certiorari denied. *Paul Berman, Sigmund Levin* and *Theodore B. Berman* for petitioners. *Talbot W. Banks* and *Thomas G. Andrew* for respondents. Reported below: 64 A. 2d 557.

No. 108. BARTLETT ET AL. *v.* DELANEY, COLLECTOR, ET AL. C. A. 1st Cir. Certiorari denied. *Edward C. Thayer* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Maurice P. Wolk* for respondents. Reported below: 173 F. 2d 535.

No. 110. LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS ET AL. *v.* MOTOR HAULAGE CO., INC. Court of Appeals of New York. Certiorari denied. *Louis B. Boudin* for petitioners. *Joseph Rotwein* for respondent. Reported below: See 85 N. E. 2d 795.

No. 111. WRIGHT *v.* REYNOLDS, COMMISSIONER, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for respondents. Reported below: 84 U. S. App. D. C. 414, 172 F. 2d 762.

No. 112. CARR *v.* NATIONAL DISCOUNT CORP. C. A. 6th Cir. Certiorari denied. *Warren E. Miller* for petitioner. *Jason L. Honigman* for respondent. Reported below: 172 F. 2d 899.

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No. 115. NAGEL *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *George H. Layman, Carl W. Berueffy* and *Hyman Smollar* for petitioner. Reported below: 185 Ore. 486, 202 P. 2d 640.

No. 116. BRADBURN *v.* SHELL OIL CO., INC. C. A. 10th Cir. Certiorari denied. *Creekmore Wallace* and *B. E. Harkey* for petitioner. *Geo. W. Cunningham* for respondent. Reported below: 173 F. 2d 815.

No. 117. WHITE *v.* FEINBERG. C. A. 5th Cir. Certiorari denied. *Miller Walton* for petitioner. Reported below: 173 F. 2d 585.

No. 120. COMMISSIONER OF INTERNAL REVENUE *v.* SMITH. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Robert Ash* for respondent. Reported below: 173 F. 2d 470.

No. 121. COMMISSIONER OF INTERNAL REVENUE *v.* LONG. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Harry C. Weeks* for respondent. Reported below: 173 F. 2d 471.

No. 123. FAHS, COLLECTOR OF INTERNAL REVENUE, *v.* ECONOMY CAB CO. ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *C. D. Towers* for respondents. Reported below: 174 F. 2d 321.

No. 124. FAHS, COLLECTOR OF INTERNAL REVENUE, *v.* NEW DEAL CAB CO. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Chester Bedell* for respondent. Reported below: 174 F. 2d 318.

No. 125. UNITED STATES *v.* PARTY CAB CO. C. A. 7th Cir. Certiorari denied. *Solicitor General Perlman* for

the United States. *Harry G. Fins* for respondent. Reported below: 172 F. 2d 87.

No. 127. GOGGIN, TRUSTEE, *v.* BYRAM, TAX COLLECTOR. C. A. 9th Cir. Certiorari denied. *Thomas S. Tobin* for petitioner. *Harold W. Kennedy* for respondent. Reported below: 172 F. 2d 868.

No. 128. EARLE C. ANTHONY, INC. *v.* MORRISON ET AL. C. A. 9th Cir. Certiorari denied. *Eugene Overton* and *Edward D. Lyman* for petitioner. *M. Burr Wellington* for respondents. Reported below: 173 F. 2d 897.

No. 129. JONES *v.* SCHICK SERVICES, INC. ET AL. C. A. 9th Cir. Certiorari denied. *Ford W. Harris* for petitioner. *Leonard S. Lyon* for respondents. Reported below: 173 F. 2d 969.

No. 130. KILLIAN *v.* PENNSYLVANIA RAILROAD CO. ET AL. Appellate Court of Illinois, First District. Certiorari denied. *Melvin L. Griffith* and *Francis H. Monek* for petitioner. *George F. Barrett* and *Theodore Schmidt* for the Pennsylvania Railroad Co.; and *Edward J. Bradley* for the Mallory Co., respondents. Reported below: 336 Ill. App. 152, 82 N. E. 2d 834.

No. 131. GOODMAN *v.* CHICAGO. Appellate Court of Illinois, First District. Certiorari denied. *Irving Goodman* for petitioner. *Benjamin S. Adamowski* and *L. Louis Karton* for respondent. Reported below: 336 Ill. App. 126, 83 N. E. 2d 23.

No. 132. PHILADELPHIA TRANSPORTATION CO. *v.* SMITH ET AL.; and

No. 133. PHILADELPHIA TRANSPORTATION CO. *v.* STERNER ET AL. C. A. 3d Cir. Certiorari denied. *Har-*

old Scott Baile and *Frederic L. Ballard* for petitioner. *John V. Diggins* for respondents; and *Benjamin D. Fenimore, pro se,* respondent. Reported below: 173 F. 2d 721.

No. 135. MACRI ET AL. *v.* UNITED STATES FOR THE USE OF SCHAEFER, DOING BUSINESS AS CONCRETE CONSTRUCTION CO., ET AL. C. A. 9th Cir. Certiorari denied. *Tom W. Holman* and *S. W. Brethorst* for petitioners. *Cutler W. Halverson* for Schaefer, respondent. *George W. Wilkins* filed a brief for the Continental Casualty Co. supporting the petition. Reported below: 173 F. 2d 5.

No. 136. BUTNAM ET AL., EXECUTORS, *v.* NEW HAMPSHIRE. Supreme Court of New Hampshire. Certiorari denied. *Stanley M. Burns* for petitioners. *William L. Phinney,* Attorney General of New Hampshire, *William S. Green,* Assistant Attorney General, and *Ernest R. D'Amours* for respondent. Reported below: 95 N. H. 383, 63 A. 2d 798.

No. 139. MARIO MERCADO E HIJOS *v.* BRANNAN, SECRETARY OF AGRICULTURE. C. A. 1st Cir. Certiorari denied. *Pedro M. Porrata* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl, John R. Benney* and *Israel Convisser* for respondent. Reported below: 173 F. 2d 554.

No. 141. RUSSELL ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA. C. A. 10th Cir. Certiorari denied. *Chas. H. Garnett* for petitioners. *David A. Richardson* for respondent. Reported below: 174 F. 2d 778.

No. 142. GENERAL BOX CO. *v.* CENTRAL METAL PRODUCTS CO. C. A. 6th Cir. Certiorari denied. *R. P. Hobson* and *John P. Sandidge* for petitioner. *Bernard Koteen* for respondent. Reported below: 174 F. 2d 125.

No. 143. WEIL *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 144. WEIL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Alexander A. Mayper* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *I. Henry Kutz* for respondent. Reported below: 173 F. 2d 805.

No. 145. BAXTER CREEK IRRIGATION DISTRICT ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *W. Coburn Cook* for petitioners. *Fred N. Howser,* Attorney General of California, and *E. G. Benard,* Deputy Attorney General, for respondents. Reported below: 170 F. 2d 1021.

No. 146. ALCOA STEAMSHIP CO., INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. Certiorari denied. *A. V. Cherbonnier* for petitioners. *Abraham M. Fisch* for respondents. Reported below: 173 F. 2d 567.

No. 151. BEHRENS *v.* SKELLY ET AL. C. A. 3d Cir. Certiorari denied. *Louis Caplan* for petitioner. *Leon E. Hickman* for respondents. Reported below: 173 F. 2d 715.

No. 152. GIBBONS *v.* DETROIT & TOLEDO SHORE LINE RAILROAD CO. C. A. 6th Cir. Certiorari denied. *Charles H. Brady* for petitioner. *Walter A. Eversman* for respondent. Reported below: 171 F. 2d 287.

No. 153. SAINT LO CONSTRUCTION CO., INC. *v.* KOENIGSBERGER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George E. Allen* and *Karl Michelet* for petitioner. *Henry*

G. Fischer, Ewing La Porte and *Geoffrey Creyke, Jr.* for respondents. Reported below: 84 U. S. App. D. C. 319, 174 F. 2d 25.

No. 160. LAVENDER, ADMINISTRATOR, *v.* ILLINOIS CENTRAL RAILROAD CO. Supreme Court of Missouri. Certiorari denied. *N. Murry Edwards* for petitioner. *Wm. R. Gentry, C. A. Helsell* and *John W. Freels* for respondent. Reported below: 358 Mo. 1160, 219 S. W. 2d 353.

No. 161. GREEN, DOING BUSINESS AS GREEN HARVESTER & IMPLEMENT CO., *v.* ALLIS-CHALMERS MANUFACTURING CO. C. A. 4th Cir. Certiorari denied. *C. T. Graydon* for petitioner. *Edward W. Mullins* for respondent. Reported below: 173 F. 2d 818.

No. 164. GILLIS, DOING BUSINESS AS GILLIS VAN SERVICE, ET AL. *v.* KEYSTONE MUTUAL CASUALTY CO. ET AL. C. A. 6th Cir. Certiorari denied. *J. A. Edge* for petitioners. Reported below: 172 F. 2d 826.

No. 166. VILLAGE OF HIGHLAND FALLS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Abraham Kopald, I. H. Wachtel* and *Harry I. Rand* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Vanech* for the United States. Reported below: 113 Ct. Cl. 107, 82 F. Supp. 516.

No. 167. ZIEGLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Charles H. Carr* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Stanley M. Silverberg* and *Robert S. Erdahl* for the United States. Reported below: 174 F. 2d 439.

No. 170. PARK-IN THEATRES, INC. *v.* LOEW'S DRIVE-IN THEATRES, INC. C. A. 1st Cir. Certiorari denied.

Leonard L. Kalish and *Melvin R. Jennery* for petitioner. *Hector M. Holmes* for respondent. Reported below: 174 F. 2d 547.

No. 176. GULF, MOBILE & OHIO RAILROAD CO. *v.* MAXIE. Supreme Court of Missouri. Certiorari denied. *Richard Wayne Ely* for petitioner. *Sol Andrews* and *William H. Allen* for respondent. Reported below: 358 Mo. 1100, 219 S. W. 2d 322.

No. 179. UNITED STATES *v.* THE AUSTRALIA STAR ET AL. C. A. 2d Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Robert S. Erskine* for The Australia Star et al.; and *John C. Prizer* for Siemens Bros. & Co. et al., respondents. Reported below: 172 F. 2d 472.

No. 180. MAIN STREET BANK ET AL. *v.* NEE, COLLECTOR OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *John H. McEvers* and *Reece A. Gardner* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Joseph W. Bishop, Jr.* for respondent. Reported below: 174 F. 2d 425.

No. 181. UPTOWN CLUB OF MANHATTAN, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Joseph R. Shaughnessy* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 113 Ct. Cl. 422, 83 F. Supp. 823.

No. 183. HOLLOWAY GRAVEL CO., INC. *v.* McCOMB, WAGE & HOUR ADMINISTRATOR. C. A. 5th Cir. Certiorari denied. *Allan Sholars* and *Geo. Gunby* for petitioner. *Solicitor General Perlman, William S. Tyson* and *Bessie Margolin* for respondent. Reported below: 174 F. 2d 421.

No. 184. GARCIA ET AL., EXECUTORS, ET AL. *v.* PAN AMERICAN AIRWAYS, INC. ET AL. Supreme Court of New York, Westchester County. Certiorari denied. *Francis X. Nestor* for petitioners. *Donald Havens* for respondents. Reported below: See 274 App. Div. 996, 84 N. Y. S. 2d 408.

No. 185. BLAIR ET AL., TRUSTEES, *v.* FINAN. C. A. 6th Cir. Certiorari denied. *Edward T. Goodrich, Harry W. Jones* and *Samuel Shapero* for petitioners. *Clarence W. Videan* for respondent. Reported below: 174 F. 2d 925.

No. 187. NEWSOM ET AL. *v.* E. I. DU PONT DE NEMOURS & Co. C. A. 6th Cir. Certiorari denied. *Lewis S. Pope* and *Whitworth Stokes* for petitioners. *Abel Klaw* for respondent. Reported below: 173 F. 2d 856.

No. 189. SHAMROCK TOWING CO., INC. *v.* F. E. GRAUWILLER TRANSPORTATION CO., INC. ET AL. C. A. 2d Cir. Certiorari denied. *Edward Ash* for petitioner. *Christopher E. Heckman* for the Grauwiller Transportation Co. et al.; and *David Haar* for the Henry Material Co., respondents. Reported below: 173 F. 2d 708.

No. 190. DILLE *v.* DELANEY ET AL. C. A. 10th Cir. Certiorari denied. *Robert Dade Hudson* for petitioner. *Gentry Lee* for Delaney et al.; and *F. M. Darrough* and *Villard Martin* for the Carter Oil Co., respondents. Reported below: 174 F. 2d 314.

No. 191. JOSEPH B. COOPER & SON, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Copal Mintz* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *John R. Benney* for the United States. Reported below: 174 F. 2d 619.

No. 192. COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES *v.* LOWELL GAS CO. Supreme Judicial Court of Massachusetts. Certiorari denied. *Francis E. Kelly,* Attorney General of Massachusetts, *Henry P. Fielding, Francis J. Roche* and *David H. Stuart,* Assistant Attorneys General, for petitioner. *Robert G. Dodge* and *Harold S. Davis* for respondent. Reported below: 324 Mass. 80, 84 N. E. 2d 811.

No. 193. PALM BEACH TRUST CO. *v.* COMMISSIONER OF INTERNAL REVENUE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *B. H. Bartholow* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *S. Dee Hanson* for respondent. Reported below: 84 U. S. App. D. C. 410, 174 F. 2d 527.

No. 194. GRAVES ET AL. *v.* SPRINGFIELD GAS & ELECTRIC CO. Supreme Court of Missouri. Certiorari denied. *Roscoe C. Patterson* for petitioners. *S. C. Bates* for respondent. Reported below: 359 Mo. 182, 221 S. W. 2d 197.

No. 201. ATLANTIC COAST LINE RAILROAD CO. *v.* HASELDEN. Supreme Court of South Carolina. Certiorari denied. *Charles Cook Howell* and *V. E. Phelps* for petitioner. *Donald Russell* for respondent. Reported below: 214 S. C. 410, 53 S. E. 2d 60.

No. 202. DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC. *v.* BRANNAN, SECRETARY OF AGRICULTURE. C. A. 2d Cir. Certiorari denied. *Seward A. Miller, Frederick P. Lee* and *Myron Scott* for petitioner. *Solicitor General Perlman, J. Stephen Doyle, Jr., Neil Brooks* and *Lewis A. Sigler* for respondent. Reported below: 173 F. 2d 57.

No. 204. HINES *v.* EDWARDS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *O. R. McGuire, Edward R. Burke* and *Ivy Lee Buchanan* for petitioner. Reported below: 85 U. S. App. D. C. 419, 174 F. 2d 670.

No. 206. URQUHART ET AL. *v.* PYRENE MANUFACTURING CO. C. A. 3d Cir. Certiorari denied. *C. Brewster Rhoads* for petitioners. *Maxwell Barus* for respondent. Reported below: 175 F. 2d 408.

No. 208. GULF COAST WESTERN OIL CO., INC. *v.* TRAPP. C. A. 10th Cir. Certiorari denied. *Hal Whitten* and *Joe W. Whitten* for petitioner. *M. E. Trapp, pro se,* respondent. Reported below: 174 F. 2d 339.

No. 209. BURMAN PROPERTIES, INC. ET AL. *v.* MCKINNEY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James C. Wilkes* and *James E. Artis* for petitioners. *John C. Poole* and *Dudley G. Skinker* for respondents. Reported below: 84 U. S. App. D. C. 373, 174 F. 2d 509.

No. 211. CENTAUR CONSTRUCTION CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Josephus C. Trimble* and *Harry S. Hall* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. Reported below: 113 Ct. Cl. 288, 83 F. Supp. 351.

No. 216. OHIO EX REL. BEVIS *v.* COFFINBERRY ET AL., MEMBERS OF THE INDUSTRIAL COMMISSION. Supreme Court of Ohio. Certiorari denied. *Robert Emmett Brooks* and *Louis C. Capelle* for petitioner. *Herbert S. Duffy,* Attorney General of Ohio, for respondents. Reported below: 151 Ohio St. 293, 85 N. E. 2d 519.

No. 219. KENTUCKY TRUST CO., EXECUTOR, *v.* GLENN, COLLECTOR OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *James E. Fahey* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Stanley M. Silverberg, Ellis N. Slack* and *Lee A. Jackson* for respondent. Reported below: 172 F. 2d 863.

No. 220. PEREZ *v.* UNITED STATES. Court of Customs and Patent Appeals. Certiorari denied. *John G. Lerch, Prew Savoy* and *David A. Golden* for petitioner. *Solicitor General Perlman, Assistant Attorney General Edelstein* and *John R. Benney* for the United States. Reported below: 36 C. C. P. A. (Customs) 114.

No. 225. ANDREW JERGENS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Homer D. Crotty* and *J. Stuart Neary* for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 175 F. 2d 130.

No. 227. MORGAN *v.* HORRALL, CHIEF OF POLICE. C. A. 9th Cir. Certiorari denied. *Joseph D. Taylor* for petitioner. *Ray L. Chesebro* and *Bourke Jones* for respondent. Reported below: 175 F. 2d 404.

No. 228. BROWN *v.* O'BRIEN. Supreme Court of Illinois. Certiorari denied. *William R. Brown* for petitioner. *John F. McCarthy* for respondent. Reported below: 403 Ill. 183, 85 N. E. 2d 685.

No. 231. STANDARD DUPLICATING MACHINES CO., INC. *v.* AMERICAN BUSINESS MACHINES CORP. C. A. 1st Cir. Certiorari denied. *George P. Dike* and *George P. Towle, Jr.* for petitioner. *Herbert W. Kenway* for respondent. Reported below: 174 F. 2d 101.

No. 232. MORTON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Clarence M. Fisher* and *Carl J. Batter* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Maryhelen Wigle* for respondent. Reported below: 174 F. 2d 302.

No. 233. COLONIAL TRUST CO. *v.* FIDELITY TRUST CO., TRUSTEE. C. A. 3d Cir. Certiorari denied. *Richard W. Ahlers* for petitioner. *Mahlon E. Lewis* for respondent. Reported below: 175 F. 2d 100.

No. 234. COWHER *v.* PENNSYLVANIA RAILROAD CO. Appellate Court of Illinois, First District. Certiorari denied. *Francis H. Monek* for petitioner. *George F. Barrett* and *Theodore Schmidt* for respondent. Reported below: 336 Ill. App. 308, 83 N. E. 2d 359.

No. 239. BOYCE ET AL. *v.* CHEMICAL PLASTICS, INC. C. A. 8th Cir. Certiorari denied. *Alice Elizabeth Culhane Fiddes* for petitioners. *Francis D. Butler* and *William Mitchell* for respondent. Reported below: 175 F. 2d 839.

No. 243. CUNNINGHAM *v.* CHICAGO. Appellate Court of Illinois, First District. Certiorari denied. *George A. Mason, George A. Mason, Jr.* and *Weightstill Woods* for petitioner. *Benjamin S. Adamowski, L. Louis Karton* and *Sydney R. Drebin* for respondent. Reported below: 336 Ill. App. 353, 83 N. E. 2d 616.

No. 251. BALTIMORE & OHIO RAILROAD CO. *v.* MAGRUDER, COLLECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *John S. Stanley* and *D. Heyward Hamilton, Jr.* for petitioner. *Solicitor General*

Perlman, Assistant Attorney General Caudle, Ellis N. Slack and *Lee A. Jackson* for respondent. Reported below: 174 F. 2d 896.

No. 253. EUREKA WILLIAMS CORP. *v.* SYNCROMATIC CORPORATION. C. A. 7th Cir. Certiorari denied. *Warren C. Horton* for petitioner. *Harold G. Baker* for respondent. Reported below: 174 F. 2d 649.

No. 254. WOODRUFF *v.* BALKCOM, WARDEN. Supreme Court of Georgia. Certiorari denied. *Harry M. Wilson* for petitioner. *Eugene Cook*, Attorney General of Georgia, for respondent. Reported below: 205 Ga. 445, 53 S. E. 2d 680.

No. 263. BENT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *James C. Wilson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *George R. Gallagher* for the United States. Reported below: 175 F. 2d 397.

No. 264. AETNA LIFE INSURANCE CO. *v.* PRESTON. C. A. 7th Cir. Certiorari denied. *Vincent O'Brien* for petitioner. *James B. Wescott* for respondent. Reported below: 174 F. 2d 10.

No. 281. CAMPBELL ET AL. *v.* BEAVER BAYOU DRAINAGE DISTRICT. Supreme Court of Arkansas. Certiorari denied. *W. G. Dinning, Jr.* for petitioners. *J. G. Burke* for respondent. Reported below: 215 Ark. 187, 219 S. W. 2d 934.

No. 91. BATTAGLINO *v.* MARSHALL, SECRETARY OF STATE. C. A. 2d Cir. Acheson, Secretary of State, substituted as the party respondent. Certiorari denied. *Joseph F. Ruggieri* for petitioner. *Solicitor General Perl-*

man, Assistant Attorney General Campbell and *Robert S. Erdahl* for respondent. Reported below: 172 F. 2d 979.

No. 92. TURNER GLASS CORP. *v.* HARTFORD-EMPIRE CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *John G. Rauch, Perry E. O'Neal, Patrick J. Smith* and *Robert D. Morgan* for petitioner. *Hubert Hickam, Alan W. Boyd, Albert R. Connelly, Joseph J. Daniels, Paul Y. Davis, Fred E. Fuller* and *Leslie Henry* for respondents. Reported below: 173 F. 2d 49.

No. 100. MAY *v.* UNITED STATES;

No. 101. GARSSON *v.* UNITED STATES; and

No. 102. GARSSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Warren E. Magee* and *Daniel J. Andersen* for petitioner in No. 100. *Arthur Garfield Hays, Osmond K. Fraenkel, John Schulman, Charles J. Margiotti* and *Perry Howard* for petitioner in No. 101. *Charles J. Margiotti, Allen J. Krouse* and *Samuel Goldstein* for petitioner in No. 102. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 84 U. S. App. D. C. 233, 175 F. 2d 994.

No. 165. SCHWENK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *George W. Riley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Stanley M. Silverberg* and *Robert S. Erdahl* for the United States.

No. 172. SCHUERMANN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney* and *Ellis N. Slack* for the United States. Reported below: 174 F. 2d 397.

No. 195. MARYLAND & VIRGINIA MILK PRODUCERS ASSN., INC. ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *William E. Leahy, Elwood H. Seal, William J. Hughes, Jr., John J. Wilson, Samuel O. Clark, Jr., W. Gwynn Gardiner, John F. Hillyard, Elisha Hanson, Arthur B. Hanson* and *William Blum, Jr.* for petitioners. *George T. Washington,* then Acting Solicitor General, *Assistant Attorney General Bergson* and *Richard E. Guggenheim* for the United States. *Seward A. Miller* and *Marion R. Garstang* filed a brief for the National Cooperative Milk Producers Federation, as *amicus curiae,* supporting the petition. Reported below: 85 U. S. App. D. C. 180, 179 F. 2d 426.

No. 205. ANDREWS *v.* HAMILTON COUNTY HOSPITAL ET AL. Supreme Court of Indiana. Certiorari denied. *Robert G. Seaks* for petitioner. *Albert Stump* for respondents. Reported below: 227 Ind. 217, 228, 84 N. E. 2d 469, 85 N. E. 2d 365.

No. 207. PRINCIPALE *v.* GENERAL PUBLIC UTILITIES CORP. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 174 F. 2d 479.

No. 210. AUBURN SAVINGS BANK ET AL. *v.* PORTLAND RAILROAD CO. ET AL. Supreme Judicial Court of Maine. Certiorari denied. MR. JUSTICE DOUGLAS took no part

in the consideration or decision of this application. *Fred N. Oliver, Michael F. McCarthy* and *Willard P. Scott* for petitioners. *Leonard A. Pierce* for the Portland Railroad Co. et al., respondents. Reported below: 65 A. 2d 17.

No. 222. ROBINSON *v.* UNITED STATES; and

No. 223. BLEKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 175 F. 2d 4.

No. 241. BEETS *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. *Howard F. McCue* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for respondent. Reported below: 180 F. 2d 101.

No. 247. GIBSON *v.* INTERNATIONAL FREIGHTING CORP. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Rowland C. Evans, Jr.* and *Thomas E. Byrne, Jr.* for respondent. Reported below: 173 F. 2d 591.

No. 261. COBB *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE JACKSON are of the opinion certiorari should be granted. *Robert Ash* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Stanley M. Silverberg, Ellis N. Slack, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 173 F. 2d 711.

No. 73, Misc. CARTER *v.* FORRESTAL, SECRETARY OF NATIONAL DEFENSE, ET AL. The motion to extend the time to file petition for writ of certiorari is denied. Petition for writ of certiorari to the United States Court of Ap-

peals for the District of Columbia Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Claude L. Dawson* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 85 U. S. App. D. C. 53, 175 F. 2d 364.

No. 1, Misc. WALKER *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois;

No. 26, Misc. BOSCIO *v.* RAGEN, WARDEN. Circuit Court of Winnebago County, Illinois;

No. 37, Misc. VILLASENOR *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois;

No. 42, Misc. ROHDE *v.* ILLINOIS. Supreme Court of Illinois (reported below: 403 Ill. 41, 85 N. E. 2d 24);

No. 60, Misc. MURPHY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois;

No. 67, Misc. COX *v.* ILLINOIS. Circuit Court of Randolph County, Illinois; and

No. 103, Misc. FERGUSON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. The petition for writ of certiorari in each of these cases is denied without consideration of the questions raised therein and without prejudice to the institution by petitioner of proceedings in any Illinois state court of competent jurisdiction under the Act of August 4, 1949, entitled: "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted." Laws of Illinois, 1949, p. 722. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. Petitioners *pro se*. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent in No. 1, Misc.

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No. 4, Misc. GRAY *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *John E. Ruth* for respondent.

No. 8, Misc. LOVELY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *David W. Robinson* and *James F. Dreher* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 175 F. 2d 312.

No. 11, Misc. DAUGHARTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George D. Rives* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 173 F. 2d 747.

No. 12, Misc. AUSTIN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 14, Misc. KEHOE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 33 Cal. 2d 711, 204 P. 2d 321.

No. 19, Misc. MAXWELL *v.* HUDSPETH, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 175 F. 2d 318.

No. 20, Misc. SMALL *v.* RAGEN, WARDEN. Circuit Court of Will County, Circuit Court of Hancock County, and the Supreme Court of Illinois. Certiorari denied.

No. 21, Misc. DARDEN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 22, Misc. LEE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 25, Misc. ABBOTT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 27, Misc. McDONALD *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 167 Kan. 369, 205 P. 2d 481.

No. 28, Misc. POWELL *v.* TURNER, SHERIFF. Supreme Court of Kansas. Certiorari denied. Reported below: 167 Kan. 524, 207 P. 2d 492.

No. 30, Misc. McCONAHAY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 31, Misc. BACOM *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Robert H. Givens, Jr.* for petitioner. Reported below: 39 So. 2d 794.

No. 35, Misc. REBESKE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 36, Misc. EBERLE *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 65 A. 2d 291.

No. 38, Misc. VALDEZ *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 40, Misc. FIELDS *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 41, Misc. JOHNSON *v.* UTAH. Supreme Court of Utah. Certiorari denied.

No. 43, Misc. NICHOLSON *v.* RAGEN, WARDEN. Circuit Court of Winnebago County, Illinois. Certiorari denied.

No. 45, Misc. WELLS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Stephen W. Downey* for petitioner. Reported below: 33 Cal. 2d 330, 202 P. 2d 53.

No. 46, Misc. WIETECHA *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 52, Misc. BRENNAN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 53, Misc. BOOKER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 54, Misc. HUNTER ET AL. *v.* MADISON AVENUE CORP. C. A. 6th Cir. Certiorari denied. *Wm. G. Cavett* for petitioner. *F. E. Hagler* for respondent. Reported below: 174 F. 2d 164.

No. 55, Misc. CASTOR *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. *Maurice J. O'Sullivan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for respondents. Reported below: 174 F. 2d 481.

No. 58, Misc. FREELAND *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. *Joseph Kadans* for petitioner. Reported below: 65 A. 2d 886.

No. 61, Misc. MCKEE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Department. Certiorari denied. Reported below: 275 App. Div. 767, 88 N. Y. S. 2d 900.

No. 62, Misc. TUCKER *v.* ALVIS, WARDEN. Second District Court of Appeals, Franklin County, Ohio. Certiorari denied.

No. 63, Misc. BAILEY *v.* ROBINSON, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 66, Misc. ALLEN *v.* ILLINOIS. Circuit Court of Massac County, Illinois. Certiorari denied.

No. 69, Misc. MASSEY *v.* MOORE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 173 F. 2d 980.

No. 71, Misc. STEVENS *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 72, Misc. BLACKBURN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 151 Ohio St. 554, 86 N. E. 2d 607.

No. 74, Misc. JENKINS *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 76, Misc. MARSH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 403 Ill. 81, 85 N. E. 2d 715.

No. 77, Misc. PENNSYLVANIA EX REL. SPADER *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 81, Misc. EAGLE *v.* CHERNEY ET AL. Court of Appeals of New York. Certiorari denied. Reported below: 298 N. Y. 855, 84 N. E. 2d 154.

No. 84, Misc. LEDER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 87, Misc. ILLINOIS EX REL. ANDERSON *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 93, Misc. WILSON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Dick Young* for petitioner. Reported below: 220 S. W. 2d 665.

No. 95, Misc. ATWOOD *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. *Joseph Kadans* for petitioner. Reported below: 66 A. 2d 204.

No. 97, Misc. PIERCE *v.* SMITH, SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 175 F. 2d 193.

No. 111, Misc. CAMPBELL *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 112, Misc. ISRAEL ET AL. *v.* CALIFORNIA. District Court of Appeal, 4th Appellate District, of California. Certiorari denied. Reported below: 91 Cal. App. 2d 773, 206 P. 2d 62.

No. 113, Misc. JOHNSON *v.* RAGEN, WARDEN, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 114, Misc. WINKENSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 115, Misc. BAID *v.* MILLER, WARDEN. Supreme Court of Wyoming. Certiorari denied.

No. 117, Misc. STEVENS *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 120, Misc. GOODMAN *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 124, Misc. COMMACK *v.* BUSH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 175 F. 2d 128.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of the applications in the foregoing cases beginning with No. 4, Misc. on page 834 and ending with No. 124, Misc. on this page.

Rehearing Denied. (*See also No. 279, October Term, 1948, supra.*)

No. 12, October Term, 1948. BRINEGAR *v.* UNITED STATES, 338 U. S. 160;

No. 128, October Term, 1948. FARMERS RESERVOIR & IRRIGATION CO. *v.* McCOMB, WAGE & HOUR ADMINISTRATOR, 337 U. S. 755;

No. 196, October Term, 1948. McCOMB, WAGE & HOUR ADMINISTRATOR, *v.* FARMERS RESERVOIR & IRRIGATION CO., 337 U. S. 755;

No. 287, October Term, 1948. INTERSTATE OIL PIPE LINE CO. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION, 337 U. S. 662;

No. 351, October Term, 1948. COSMOPOLITAN SHIPPING CO., INC. *v.* McALLISTER, 337 U. S. 783;

No. 509, October Term, 1948. KOHL *v.* COMMISSIONER OF INTERNAL REVENUE, 337 U. S. 956;

No. 522, October Term, 1948. RAGAN *v.* MERCHANTS TRANSFER & WAREHOUSE CO., INC., 337 U. S. 530;

No. 604, October Term, 1948. AJAX TRUCKING CO., INC. *v.* BROWNE ET AL., CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK, 337 U. S. 951;

No. 659, October Term, 1948. FUJINO *v.* CLARK, ATTORNEY GENERAL, 337 U. S. 937;

No. 740, October Term, 1948. TIBBALS ET AL. *v.* MICA MOUNTAIN MINES, INC. ET AL., 337 U. S. 925;

No. 748, October Term, 1948. ZIMMERMANN *v.* UNITED STATES, 337 U. S. 941;

No. 788, October Term, 1948. LATTA ET AL. *v.* WESTERN INVESTMENT CO. ET AL., 337 U. S. 940;

No. 791, October Term, 1948. CONTINENTAL CASUALTY CO. *v.* UNITED STATES FOR THE USE OF SCHAEFER, DOING BUSINESS AS THE CONCRETE CONSTRUCTION CO., ET AL., 337 U. S. 940;

No. 826, October Term, 1948. WHETSTONE *v.* UNITED STATES, 337 U. S. 941;

No. 832, October Term, 1948. LYONS *v.* CAPITAL TRANSIT CO., 337 U. S. 942; and

No. 877, October Term, 1948. KEATING *v.* UNITED STATES, 337 U. S. 959. The petitions for rehearing in these cases are severally denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 31, October Term, 1948. LARSON, WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR, *v.* DOMESTIC & FOREIGN COMMERCE CORP., 337 U. S. 682. The petition for rehearing and alternative motion to amend the judgment and mandate are denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 84, October Term, 1948. COMMISSIONER OF INTERNAL REVENUE *v.* WODEHOUSE, 337 U. S. 369. Rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 253, October Term, 1948. UNITED STATES *v.* PENN FOUNDRY & MANUFACTURING CO., INC., 337 U. S. 198.

Petition for rehearing or for modification of judgment remanding case for additional findings denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 390, October Term, 1948. PROPPER, RECEIVER, *v.* CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, 337 U. S. 472. Rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 525, October Term, 1948. MOORE *v.* COMMISSIONER OF INTERNAL REVENUE, 337 U. S. 956. The motion for leave to file petition for rehearing is denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 649, October Term, 1948. LONGYEAR HOLDING CO. ET AL. *v.* MINNESOTA, 336 U. S. 948. The motion for leave to file a second petition for rehearing is denied. MR. JUSTICE BURTON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 671, October Term, 1948. WILLIAMS *v.* NEW YORK, 337 U. S. 241. Petition for rehearing of the order of June 27, 1949, 337 U. S. 961, denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 795, October Term, 1948. FAINBLATT *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 796, October Term, 1948. FAINBLATT *v.* COMMISSIONER OF INTERNAL REVENUE, 337 U. S. 957. The mo-

tion for leave to file petition for rehearing is denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 810, October Term, 1948. CARTER OIL CO. *v.* RAMSEY ET AL., 337 U. S. 958. Motion of petitioner for leave to file certified copy of order of Circuit Court of Fayette County denied. The petition for rehearing is denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 66, Misc., October Term, 1948. EPPLE *v.* DUFFY, WARDEN, 335 U. S. 834;

No. 417, Misc., October Term, 1948. WHELAN *v.* UNITED STATES, 337 U. S. 931;

No. 440, Misc., October Term, 1948. WILDE *v.* LOUISIANA, 337 U. S. 932;

No. 581, Misc., October Term, 1948. GAY *v.* FIDELITY UNION TRUST CO., EXECUTOR, 337 U. S. 945;

No. 598, Misc., October Term, 1948. SHOTKIN ET AL. *v.* DENVER PUBLISHING CO. ET AL., 337 U. S. 929;

No. 628, Misc., October Term, 1948. REEVES *v.* GEORGIA, 337 U. S. 946;

No. 629, Misc., October Term, 1948. WALLACE *v.* UNITED STATES, 337 U. S. 947; and

No. 666, Misc., October Term, 1948. EDELMAN *v.* CALIFORNIA, 337 U. S. 949. The petitions for rehearing in these cases are severally denied. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 480, Misc., October Term, 1948. AGNEW *v.* CALIFORNIA, 337 U. S. 909. The second petition for rehearing is denied. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

October 17, 1949.

Per Curiam Decisions.

No. 174. Dickinson *v.* Porter, State Comptroller, et al. Appeal from the Supreme Court of Iowa. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Mr. Justice Douglas took no part in the consideration or decision of this case. *Martin M. Cooney* for appellant. *Robert L. Larson,* Attorney General of Iowa, *Don Hise,* First Assistant Attorney General, *Earl F. Wisdom* and *Bert F. Wisdom* for appellees. Reported below: 240 Iowa 393, 35 N. W. 2d 66.

No. 244. Securities & Exchange Commission et al. *v.* Otis & Co. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540; *Federal Power Comm'n* v. *Arkansas Power Co.,* 330 U. S. 802. Mr. Justice Douglas took no part in the consideration or decision of this case. *Solicitor General Perlman* and *Roger S. Foster* for petitioners. *Joseph L. Weiner* for respondent. Reported below: 85 U. S. App. D. C. 122, 176 F. 2d 34.

No. 265. United States et al. *v.* Interstate Common Carrier Council of Maryland, Inc. et al.; and

No. 266. Schreiber Trucking Co., Inc. *v.* Interstate Common Carrier Council of Maryland, Inc. et al. Appeals from the United States District Court for the District of Maryland. *Per Curiam:* The judgment is affirmed. *Florida* v. *United States,* 282 U. S. 194; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475. Mr. Justice Black and Mr. Justice Reed are of the opinion

that probable jurisdiction should be noted and the cases set down for argument. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellants in No. 265. *Hall Hammond* for appellant in No. 266. *John R. Norris* for appellees. Reported below: 84 F. Supp. 414.

No. 319. PRICE *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Appellant *pro se*. *Greek L. Rice,* Attorney General of Mississippi, and *George H. Ethridge,* Assistant Attorney General, for appellee. Reported below: 207 Miss. 111, 41 So. 2d 37.

No. 320. MILLER *v.* WIGGINS, SUPERINTENDENT. Appeal from and petition for writ of certiorari to the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Thurgood Marshall* and *Franklin H. Williams* for appellant. *Greek L. Rice,* Attorney General of Mississippi, and *George H. Ethridge,* Assistant Attorney General, for appellee. Reported below: 207 Miss. 156, 41 So. 2d 375.

No. 323. MOORE *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2).

Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Appellant *pro se*. *Greek L. Rice*, Attorney General of Mississippi, and *George H. Ethridge*, Assistant Attorney General, for appellee. Reported below: 207 Miss. 140, 41 So. 2d 368.

Miscellaneous Orders.

No. 61. HUGHES ET AL. *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA. The motion for leave to withdraw the appearance of W. H. Orrick as counsel for the respondent is granted.

No. 130, Misc. BRADSHAW *v.* RAYMOND, SUPERINTENDENT, ET AL.;

No. 133, Misc. MCDOWELL *v.* DOWD, WARDEN; and

No. 135, Misc. CARROLL *v.* SWENSON, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 134, Misc. SWITZER *v.* REDNOUR, SUPERINTENDENT, ET AL. Petition denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 137, Misc. EX PARTE BLASS ET AL.; and

No. 146, Misc. LEHIGH *v.* WILLIAMS, GOVERNOR OF MICHIGAN, ET AL. The motions for leave to file petitions for writs of mandamus are denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Curley C. Hoffpauir* for petitioners in No. 137, Misc.

No. 141, Misc. IN RE BEST. Application denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

Certiorari Granted. (*See also No. 244, supra.*)

No. 83. REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA *v.* CARROLL ET AL. Court of Appeals of Georgia. Certiorari granted. *Eugene Cook,* Attorney General of Georgia, and *Hamilton Lokey,* Deputy Assistant Attorney General, for petitioner. *James A. Branch* for respondents. *Solicitor General Perlman* and *Benedict P. Cottone* filed a brief for the Federal Communications Commission, as *amicus curiae,* supporting the petition. Reported below: 78 Ga. App. 292, 50 S. E. 2d 808.

No. 98. UNITED STATES *v.* FLEISCHMAN; and

No. 99. UNITED STATES *v.* BRYAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for the United States. *O. John Rogge* and *Benedict Wolf* for respondents. Reported below: 84 U. S. App. D. C. 388, 394, 174 F. 2d 519, 525.

No. 214. UNITED STATES *v.* CUMBERLAND PUBLIC SERVICE CO. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Wilson W. Wyatt* for respondent. Reported below: 113 Ct. Cl. 460, 83 F. Supp. 843.

No. 221. SKELLY OIL CO. ET AL. *v.* PHILLIPS PETROLEUM CO. C. A. 10th Cir. Certiorari granted. *W. P. Z. German, Alvin F. Molony, Donald Campbell, Ray S. Fellows, Dan Moody, Charles L. Black, Walace Hawkins* and *Earl A. Brown* for petitioners. *H. Don Emery, Rayburn L. Foster, R. B. F. Hummer, Harry D. Turner* and *Eugene O. Monnett* for respondent. Reported below: 174 F. 2d 89.

Certiorari Denied. (*See also Nos. 319, 320 and 323, supra.*)

No. 109. WINCHESTER ET AL. *v.* GREGG. C. A. 9th Cir. Certiorari denied. *Oliver O. Clark* for petitioners. *Guy Richards Crump* for respondent. Reported below: 173 F. 2d 512.

No. 149. UNITED STATES *v.* COLORADO & SOUTHERN RAILWAY CO. United States District Court for the District of Colorado. Certiorari denied. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Helen Goodner* for the United States. *J. C. James* and *Walter McFarland* for respondent. Reported below: 84 F. Supp. 134.

No. 155. BRODHEAD, DOING BUSINESS AS T. H. BRODHEAD CO., *v.* BORTHWICK, TAX COMMISSIONER & TAX COLLECTOR. C. A. 9th Cir. Certiorari denied. *Julius Russell Cades* and *Urban E. Wild* for petitioner. *Walter D. Ackerman, Jr.*, Attorney General of Hawaii, *Thomas W. Flynn*, Deputy Attorney General, and *Rhoda V. Lewis*, Assistant Attorney General, for respondent. Reported below: 174 F. 2d 21.

No. 215. CAMPBELL SOUP CO. ET AL. *v.* ARMOUR & CO. C. A. 3d Cir. Certiorari denied. *Robert T. McCracken, C. Russell Phillips, William T. Woodson* and *Harry D. Nims* for petitioners. *Walter J. Blenko, Wm. Clarke Mason, Thomas B. K. Ringe* and *George E. Leonard, Jr.* for respondent. Reported below: 175 F. 2d 795.

No. 226. MONTOYA *v.* TIDE WATER ASSOCIATED OIL CO. C. A. 2d Cir. Certiorari denied. *William L. Standard* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Cecelia H. Goetz* for respondent. Reported below: 174 F. 2d 607.

No. 237. RICHMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Harold Simandl* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Israel Convisser* for the United States. Reported below: 176 F. 2d 889.

No. 246. WILLIS ET AL. *v.* BARNSDALL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. *Robert S. Vance* for petitioners. *William H. Arnold, Jr.* for respondents. Reported below: 173 F. 2d 979.

No. 252. GRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *G. Aaron Youngquist* and *Leonard L. Kalish* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Vincent A. Kleinfeld* for the United States. Reported below: 174 F. 2d 919.

No. 63. STEELE'S MILLS ET AL. *v.* ROBERTSON, COLLECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *John M. Robinson* and *Russell M. Robinson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Harry Baum* for respondent. Reported below: 172 F. 2d 817.

No. 203. CRANE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *David W. Louisell* for petitioner. *Stephen J. Roth,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent. Reported below: 323 Mich. 646, 652, 36 N. W. 2d 170.

No. 212. UNITED STATES *v.* SEABOARD AIR LINE RAILROAD CO. Court of Claims. Certiorari denied. MR.

JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *Frank J. Wideman* for respondent. Reported below: 113 Ct. Cl. 437, 83 F. Supp. 1012.

No. 240. BARCLAY, EXECUTOR, *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *C. Ward Eicher* and *Earl F. Reed* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for the United States. Reported below: 175 F. 2d 48.

No. 260. POTTS ET AL. *v.* RADER, ADMINISTRATOR, ET AL. Supreme Court of Arkansas. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Alexander H. Sands* for petitioners. *Archibald G. Robertson* for Shinberger et al., respondents. Reported below: 215 Ark. 160, 219 S. W. 2d 769.

No. 262. MYRES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Homer Cummings, Max O'Rell Truitt, William D. Donnelly* and *John H. Flanigan, Sr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney, Ellis N. Slack* and *Andrew F. Oehmann* for the United States. Reported below: 174 F. 2d 329.

No. 269. RUSSELL, CIRCUIT COURT JUDGE, *v.* MISSOURI EX REL. ST. LOUIS-SAN FRANCISCO RAILWAY CO. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Victor Packman, Henry D. Espy,*

Charles H. Houston and *Joseph C. Waddy* for petitioner. *Cornelius H. Skinker, Jr.* for respondent. Reported below: 358 Mo. 1136, 219 S. W. 2d 340.

No. 270. LYONS *v.* WELTMER ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 174 F. 2d 473.

No. 272. DILLE *v.* CARTER OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Petitioner *pro se*. *Gentry Lee* for Delaney et al., respondents. Reported below: 174 F. 2d 318.

No. 336. HENDERSON ET AL. *v.* DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION ET AL. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Wm. E. Leahy* and *William J. Hughes, Jr.* for petitioners. *T. McKeen Chidsey,* Attorney General of Pennsylvania, *Robert M. Mountenay,* Assistant Attorney General, *H. F. Stambaugh* and *John H. Pursel* for respondents. Reported below: 362 Pa. 475, 66 A. 2d 843.

No. 339. ILLINOIS *v.* SULLIVAN, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *John S. Boyle, Gordon B. Nash* and *Melvin F. Wingersky* for petitioner. Reported below: 175 F. 2d 282.

No. 341. BRIDGE AUTO RENTING CORP. ET AL. *v.* PEDRICK, COLLECTOR OF INTERNAL REVENUE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Carlos L. Israels* for petitioners. *Solicitor General Perlman* for respondents. Reported below: 174 F. 2d 733.

No. 140. UNITED STATES *v.* ROSEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *Morton Stavis* for respondent. Reported below: 174 F. 2d 187.

No. 255. HALL *v.* UNITED STATES;

No. 256. WINSTON *v.* UNITED STATES;

No. 257. UNITED STATES EX REL. HALL *v.* MULCAHY, U. S. MARSHAL;

No. 258. UNITED STATES EX REL. WINSTON *v.* MULCAHY, U. S. MARSHAL; and

No. 259. GREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *George W. Crockett, Jr., Richard Gladstein, Abraham J. Isserman, Harry Sacher, Charles H. Houston* and *Walter F. Dodd* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Irving S. Shapiro* for respondents. Reported below: Nos. 255–258, 176 F. 2d 163; No. 259, 176 F. 2d 169.

No. 268. TURNER *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Palmer Pillans* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech, Ralph J. Luttrell* and *Howard O. Sigmond* for the United States. Reported below: 175 F. 2d 644.

No. 32, Misc. FLETCHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no

part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 174 F. 2d 373.

No. 86, Misc. JOHNSON *v.* ATLANTIC COAST LINE RAILROAD CO. Supreme Court of Florida. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Will O. Murrell* for petitioner. *Charles Cook Howell* for respondent. Reported below: 40 So. 2d 892.

No. 99, Misc. DEPOFI *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Samuel G. Wagner* and *Albert A. Fiok* for petitioner. *William S. Rahauser* for respondent. Reported below: 362 Pa. 229, 66 A. 2d 649.

No. 123, Misc. MANNING *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois;

No. 127, Misc. POPPE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois;

No. 132, Misc. ROLLO ET AL. *v.* FRISBIE, WARDEN. Supreme Court of Michigan;

No. 136, Misc. WATKINS *v.* CALIFORNIA. District Court of Appeal, 2d Appellate District, of California;

No. 142, Misc. WILLIAMS *v.* NEW YORK. Supreme Court of New York;

No. 144, Misc. ANDERSON *v.* MISSOURI. Supreme Court of Missouri;

No. 145, Misc. REEDER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois;

No. 147, Misc. BAUTZ *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois;

No. 148, Misc. WELLS *v.* RAGEN, WARDEN. Circuit Court of Madison County, Illinois;

No. 149, Misc. KELLOGG *v.* MILLER, WARDEN. Supreme Court of Wyoming;

No. 154, Misc. BANKS *v.* RAGEN, WARDEN. Supreme Court of Illinois; and

No. 158, Misc. BALDRIDGE *v.* RAGEN, WARDEN. Supreme Court of Illinois. The petitions for writs of certiorari in these cases are severally denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 128, Misc. GILMORE *v.* RAGEN, WARDEN. The petition for writ of certiorari to the Criminal Court of Cook County, Illinois, is denied without consideration of the questions raised therein and without prejudice to the institution by petitioner of proceedings in any Illinois state court of competent jurisdiction under the Act of August 4, 1949, entitled: "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted." Laws of Illinois, 1949, p. 722. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

Rehearing Denied.

No. 377, Misc., October Term, 1948. FERGUSON, TEMPORARY ADMINISTRATOR, ET AL. *v.* FERGUSON, 337 U. S. 943. Rehearing denied. MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, and MR. JUSTICE MINTON took no part in the consideration or decision of this application.

October 18, 1949.

Rehearing Denied.

No. 101. Garsson *v.* United States; and

No. 102. Garsson *v.* United States, 338 U. S. 830. Motions for extension of time to file petitions for rehearing denied. The Chief Justice, Mr. Justice Clark, and Mr. Justice Minton took no part in the consideration or decision of these applications.

October 24, 1949.*

Per Curiam Decisions.

No. 224. Baskin *v.* Industrial Accident Commission et al. On petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The petition for writ of certiorari is granted. It appears that the decision of this Court in *Bethlehem Steel Co.* v. *Moores,* 335 U. S. 874, affirming the decision of the Supreme Judicial Court of Massachusetts, 323 Mass. 162, 80 N. E. 2d 478, was not available to the District Court of Appeal at the time of its consideration of this cause. The judgment is vacated and the cause remanded to the District Court of Appeal for reconsideration in the light of *Bethlehem Steel Co.* v. *Moores, supra,* and *Davis* v. *Department of Labor,* 317 U. S. 249. See *Minnesota* v. *National Tea Co.,* 309 U. S. 551; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511. *Franklin C. Stark* and *Samuel B. Horovitz* for petitioner. *Everett A. Corten* for the Industrial Accident Commission; and *Oliver Dibble* for the Kaiser Company et al., respondents. Reported below: 89 Cal. App. 2d 632, 201 P. 2d 549.

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*Mr. Justice Douglas took no part in the consideration or decision of the cases in which judgments and orders were this day announced.

No. 324. PATTON *v.* MISSISSIPPI. Appeal from and petition for writ of certiorari to the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *Franklin H. Williams* for appellant-petitioner. *Greek L. Rice,* Attorney General of Mississippi, and *George H. Ethridge,* Assistant Attorney General, for appellee-respondent. Reported below: 207 Miss. 120, 40 So. 2d 592, 41 So. 2d 55.

No. 326. GRAY ET AL. *v.* WEST VIRGINIA. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Brooks B. Callaghan, Clarence E. Martin, Jr.* and *Clarence E. Martin* for appellants. *Ira J. Partlow,* Attorney General of West Virginia, and *William C. Marland,* Assistant Attorney General, for appellee. Reported below: 132 W. Va. —, 52 S. E. 2d 759.

No. 338. ACME FAST FREIGHT, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *David Axelrod, James L. Givan* and *Homer S. Carpenter* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellees.

Miscellaneous Orders.

No. 3. UNITED STATES EX REL. EICHENLAUB *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION; and

No. 82. UNITED STATES EX REL. WILLUMEIT *v.* WATKINS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZA-

TION SERVICE. Shaughnessy, Acting District Director, substituted as the party respondent.

No. 9, Original. ILLINOIS *v.* INDIANA ET AL. The Fourth Special Report of the Special Master is approved. The amended bill of complaint is dismissed as to (1) Cities Service Oil Company, pursuant to joint motion of complainant, State of Illinois, and the defendants, State of Indiana, City of East Chicago, and Cities Service Oil Company; (2) Cudahy Packing Company, pursuant to joint motion of complainant, State of Illinois, and the defendants, State of Indiana, City of East Chicago, and Cudahy Packing Company; (3) Inland Steel Company, pursuant to joint motion of complainant, State of Illinois, and the defendants, State of Indiana, City of East Chicago, and Inland Steel Company; (4) National Tube Company, pursuant to joint motion of complainant, State of Illinois, and the defendants, State of Indiana, City of Gary, Indiana, and National Tube Company; (5) Sinclair Refining Company, pursuant to joint motion of complainant, State of Illinois, and the defendants, State of Indiana, City of East Chicago, and Sinclair Refining Company; (6) and Socony-Vacuum Oil Company, Incorporated, pursuant to joint motion of complainant, State of Illinois, and the defendants, State of Indiana, City of East Chicago, and Socony-Vacuum Oil Company. Costs against these defendants are to be taxed in accordance with the recommendations of the Special Master.

The Fourth Interim Report of the Special Master dated September 7, 1949, is approved. The Court orders and directs the Special Master to continue the proceedings in accordance with the order of this Court dated February 17, 1947. The Court further orders that the recommendation of the Special Master as to the apportionment of costs be adopted and costs for the period from September 8,

1948, to September 7, 1949, inclusive, shall be taxed as recommended in the Fourth Interim Report.

An order is entered fixing the compensation and allowing the expenses of the Special Master as of September 7, 1949.

No. 152, Misc. PLAINE *v.* BURFORD, WARDEN;
No. 161, Misc. HOBBS *v.* SWENSON, WARDEN;
No. 163, Misc. PULLINS *v.* ALVIS, WARDEN; and
No. 168, Misc. RUTHVEN *v.* OVERHOLSER. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 155, Misc. RHEIM *v.* FOSTER, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

Certiorari Granted. (*See also No. 224, supra.*)

No. 156. UNITED STATES *v.* COMMODITIES TRADING CORP. ET AL. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Edward L. Blackman* for respondents. Reported below: 113 Ct. Cl. 244, 83 F. Supp. 356.

No. 163. COMMODITIES TRADING CORP. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari granted. *Edward L. Blackman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for the United States. Reported below: 113 Ct. Cl. 244, 83 F. Supp. 356.

No. 273. UNITED STATES *v.* MORTON SALT CO.; and
No. 274. UNITED STATES *v.* INTERNATIONAL SALT CO. C. A. 7th Cir. Certiorari granted. MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consid-

eration or decision of this application. *Solicitor General Perlman* for the United States. *L. M. McBride* for respondent in No. 273. *Louis H. Hall* for respondent in No. 274. Reported below: 174 F. 2d 703.

Certiorari Denied. (*See also No. 324 and No. 155, Misc., supra.*)

No. 186. DALLAS *v.* RENTZEL, CIVIL AERONAUTICS ADMINISTRATOR. C. A. 5th Cir. Certiorari denied. *H. P. Kucera* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson* and *William D. McFarlane* for respondent. Reported below: 172 F. 2d 122.

No. 218. P. DOUGHERTY CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Theodore B. Benson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Joseph Kovner* for the United States. Reported below: 113 Ct. Cl. 448, 83 F. Supp. 688.

No. 267. SACHS *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. *Nathan Witt* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for respondent. Reported below: 176 F. 2d 292.

No. 275. NEWS SYNDICATE CO., INC. *v.* MATTOX. C. A. 2d Cir. Certiorari denied. *Stuart N. Updike* for petitioner. *Louis B. Fine* for respondent. Reported below: 176 F. 2d 897.

No. 276. HOUSTON OIL CO. *v.* AMERICAN REPUBLICS CORP. C. A. 5th Cir. Certiorari denied. *William Hamlet Blades* and *T. E. Kennerly* for petitioner. *Beaman Strong* for respondent. Reported below: 173 F. 2d 728.

No. 279. WONG *v.* FINKELSTEIN ET AL., CONSTITUTING THE TEMPORARY CITY HOUSING RENT COMMISSION. Court of Appeals of New York. Certiorari denied. *Herbert Burton Brill* for petitioner. *Nathan W. Math* for respondents. Reported below: 299 N. Y. 205, 86 N. E. 2d 563.

No. 282. FLYNN, TRUSTEE, ET AL. *v.* RECONSTRUCTION FINANCE CORP. C. A. 2d Cir. Certiorari denied. *Clifford L. Porter* and *Chester B. McLaughlin* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for respondent. Reported below: 175 F. 2d 761.

No. 283. CROSS *v.* KILIANI. Court of Appeals of New York. Certiorari denied. *Arthur G. Warner* and *James E. Birdsall* for petitioner. *Joseph Walker* for respondent. Reported below: 299 N. Y. 680, 87 N. E. 2d 68.

No. 285. HEALD *v.* UNITED STATES;
No. 286. HEALD *v.* UNITED STATES; and
No. 287. HEALD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Byron G. Rogers* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Israel Convisser* for the United States. Reported below: 175 F. 2d 878.

No. 288. LYKES BROS. STEAMSHIP CO., INC. *v.* CANNELLA. C. A. 2d Cir. Certiorari denied. *Arthur M. Boal* for petitioner. *Nathan Baker* for respondent. Reported below: 174 F. 2d 794.

No. 289. REMINGTON RAND, INC. *v.* ROYAL TYPEWRITER CO., INC. C. A. 2d Cir. Certiorari denied. *Francis J. McNamara* and *Joseph V. Meigs* for petitioner. *William H. Davis* and *George E. Faithfull* for respondent.

No. 291. COLEMAN *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. *Elisha Scott* and *Thurman L. Dodson* for petitioner. Reported below: 166 Kan. 707, 204 P. 2d 584.

No. 294. S. C. JOHNSON & SON, INC. *v.* JOHNSON ET AL. C. A. 2d Cir. Certiorari denied. *William T. Woodson, Beverly W. Pattishall* and *Robert M. Hitchcock* for petitioner. *Edwin T. Bean* and *Conrad Christel* for respondents. Reported below: 175 F. 2d 176.

No. 295. HIMMELFARB *v.* UNITED STATES; and

No. 296. ORMONT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William Katz* for petitioner in No. 295. *William Jennings Bryan, Jr.* for petitioner in No. 296. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney, Ellis N. Slack, Joseph W. Bishop, Jr., Carlton Fox* and *Fred G. Folsom* for the United States. Reported below: 175 F. 2d 924.

No. 280. WILLAPOINT OYSTERS, INC. *v.* EWING, ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied. *Albert E. Stephan* for petitioner. *Solicitor General Perlman; Assistant Attorney General Campbell, Robert S. Erdahl, John T. Grigsby* and *William W. Goodrich* for respondents. *Smith Troy,* Attorney General, and *Lyle L. Iversen,* Assistant Attorney General, filed a brief for the State of Washington, as *amicus curiae,* supporting the petition. Reported below: 174 F. 2d 676.

No. 284. LAPIDES *v.* CLARK, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. McGrath substituted as a party respondent for Clark. Certiorari denied. *Jack Wasserman, Irving Jaffe, William Maslow* and *Abram Orlow* for petitioner. *Solicitor General Perlman, Assistant Attor-*

ney General Campbell, Robert S. Erdahl and *L. Paul Winings* for respondents. *Marcus Cohn* filed a brief for the American Jewish Committee, as *amicus curiae,* supporting the petition. Reported below: 85 U. S. App. D. C. 101, 176 F. 2d 619.

No. 292. DURYEE, TRUSTEE, *v.* ERIE RAILROAD CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Richard Swan Buell* for petitioner. *John A. Hadden* and *John S. Beard, Jr.* for respondent. Reported below: 175 F. 2d 58.

No. 290. PAYNE *v.* UNITED STATES; and

No. 318. BRIGGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John W. Porter, Jr.* for petitioner in No. 290. *R. M. Mountcastle* and *Kelly Brown* for petitioner in No. 318. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 176 F. 2d 317.

No. 298. GEISLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consideration or decision of this application. *A. F. W. Siebel* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 174 F. 2d 992.

No. 299. BOWLES, FOR AND IN BEHALF OF THE UNITED STATES, ET AL. *v.* WILKE ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consideration or decision of this application. *Solicitor General Perlman* for petitioners. *Cushman B. Bissell* for respondents. Reported below: 175 F. 2d 35.

No. 57, Misc. SIMMONS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Thomas D. Caldwell* for petitioner. *Carl B. Shelley* for respondent. Reported below: 361 Pa. 391, 65 A. 2d 353.

No. 96, Misc. DARCY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Thomas D. McBride* for petitioner. *Willard S. Curtin* for respondent. Reported below: 362 Pa. 259, 66 A. 2d 663.

No. 102, Misc. PENNSYLVANIA EX REL. DARCY *v.* HANDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. *Thomas D. McBride* for petitioner. *Willard S. Curtin* for respondent. Reported below: See 362 Pa. 259, 66 A. 2d 663.

No. 107, Misc. SCHNEIDER *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Charles A. Horsky* for petitioner. *John W. Metzger,* Attorney General of Colorado, and *Raymond B. Danks,* Assistant Attorney General, for respondent. Reported below: See 118 Colo. 543, 199 P. 2d 873.

No. 151, Misc. PERKINS *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Petitioner *pro se. Smith Troy,* Attorney General of the State of Washington, and *John D. Blankinship,* Assistant Attorney General, for respondent. Reported below: See 32 Wash. 2d 810, 204 P. 2d 207.

No. 156, Misc. BARMORE *v.* FOSTER, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *Herman N. Harcourt* and *George A. Radz,* Assistant Attorneys General, for respondent.

No. 164, Misc. BRITT *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 173, Misc. CORDTS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 174, Misc. SCHUMAN *v.* HEINZE, WARDEN. District Court of Appeal, 3d Appellate District, of California. Certiorari denied.

Rehearing Denied.

No. 157, October Term, 1939. WEBER *v.* UNITED STATES, 308 U. S. 590. Rehearing denied.

No. 788, October Term, 1948. LATTA ET AL. *v.* WESTERN INVESTMENT CO. ET AL., 337 U. S. 940. The motion for leave to file a second petition for rehearing is denied.

NOVEMBER 7, 1949.

Per Curiam Decisions.

No. 342. VINSONHALER ET AL., DOING BUSINESS AS KGHI BROADCASTING SERVICE, ET AL. *v.* BEARD, COLLECTOR. Appeal from the Supreme Court of Arkansas. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Crutcher* v. *Kentucky,* 141 U. S. 47. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Bruce T. Bullion* and *Eugene R. Warren* for appellants. *T. J. Gentry* for appellee. Reported below: 215 Ark. 389, 221 S. W. 2d 3.

No. 344. DEXTER *v.* WASHINGTON. Appeal from the Supreme Court of Washington. *Per Curiam:* The judgment is affirmed. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Harry T. Davenport* for appellant. *Smith Troy,* Attorney Gen-

eral of Washington, and *Lyle L. Iversen,* Assistant Attorney General, for appellee. Reported below: 32 Wash. 2d 551, 202 P. 2d 906.

No. 363. Lynchburg Traffic Bureau *v.* United States et al. Appeal from the United States District Court for the Western District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. Mr. Justice Douglas took no part in the consideration or decision of this case. *W. G. Burnette* for appellant. *Solicitor General Perlman* and *J. Stanley Payne* for the United States and the Interstate Commerce Commission, appellees. Reported below: 84 F. Supp. 1012.

No. 332. Dye, Warden, *v.* Johnson. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Ex parte Hawk,* 321 U. S. 114. Mr. Justice Douglas took no part in the consideration or decision of this case. *T. McKeen Chidsey,* Attorney General of Pennsylvania, *H. J. Woodward, Raymond D. Evans,* Deputy Attorneys General, and *William S. Rahauser* for petitioner. *Eugene Cook,* Attorney General, and *M. H. Blackshear, Jr.,* Assistant Attorney General, filed a brief for the State of Georgia, as *amicus curiae,* supporting the petition. Reported below: 175 F. 2d 250.

No. 375. Western Union Division, Commercial Telegraphers' Union, A. F. of L., *v.* United States et al. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *McLean Trucking Co.* v. *United States,* 321 U. S. 67. Mr. Justice Black and Mr. Justice Douglas took no part in the con-

sideration or decision of this case. *Frank Bloom* for appellant. *Solicitor General Perlman* and *Benedict P. Cottone* for the United States and the Federal Communications Commission; and *John H. Waters, William G. H. Acheson* and *Dale D. Drain* for the Western Union Telegraph Co., appellees. Reported below: 87 F. Supp. 324.

Miscellaneous Order.

No. 91, Misc. McCann *v.* United States. Petition denied. Mr. Justice Douglas took no part in the consideration or decision of this application.

Certiorari Granted. (*See also No. 332, supra.*)

No. 44. Sweatt *v.* Painter et al. Supreme Court of Texas. Certiorari granted. *W. J. Durham, William H. Hastie, William R. Ming, Jr., James M. Nabrit, Jr.* and *Thurgood Marshall* for petitioner. *Price Daniel,* Attorney General of Texas, *E. Jacobson,* Assistant Attorney General, and *Joe R. Greenhill,* First Assistant Attorney General, for respondents. Briefs of *amici curiae* supporting the petition were filed by *Thomas I. Emerson, John P. Frank, Harold C. Havighurst* and *Edward H. Levi* for the Committee of Law Teachers Against Segregation in Legal Education; *Arthur J. Goldberg* and *Thomas E. Harris* for the Congress of Industrial Organizations; *William Maslow, Shad Polier* and *Joseph B. Robison* for the American Jewish Congress; *Marcus Cohn* and *Jacob Grumet* for the American Jewish Committee et al.; *Phineas Indritz, Paul Dobin* and *Jerome H. Spingarn* for the American Veterans Committee; and *Charles H. Tuttle* for the Federal Council of the Churches of Christ in America.

No. 107. Standard Oil Co. *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari granted. Mr. Justice Douglas and Mr. Justice Minton took no part

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in the consideration or decision of this application. *Weymouth Kirkland, Howard Ellis, Arthur J. Abbott* and *Thomas E. Sunderland* for petitioner. *Solicitor General Perlman* filed a memorandum for the Federal Trade Commission, stating that the Government does not oppose allowance of the petition. *Wilbur Duberstein* filed a brief for the Retail Gasoline Dealers Association of Michigan, as *amicus curiae,* opposing the petition. Reported below: 173 F. 2d 210.

No. 302. District of Columbia *v.* Little. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. Mr. Justice Douglas took no part in the consideration or decision of this application. *Vernon E. West, Chester H. Gray, Lee F. Dante* and *Edward A. Beard* for petitioner. *John P. McGrath, Ray L. Chesebro, Benjamin S. Adamowski, Alexander G. Brown* and *Charles S. Rhyne* filed a brief for the National Institute of Municipal Law Officers, as *amicus curiae,* supporting the petition. Reported below: 85 U. S. App. D. C. 242, 178 F. 2d 13.

Certiorari Denied.

No. 177. Pennsylvania Railroad Co. *v.* Krenger. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this application. *John Vance Hewitt* for petitioner. *William A. Blank* for respondent. Reported below: 174 F. 2d 556.

No. 235. Soble *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this application. *A. S. Baskett* and *D. A. Frank* for petitioner. *Price Daniel,* Attorney General of Texas, *Joe R. Greenhill,* First Assistant Attorney General, and *Jesse P. Luton, Jr.,* Assistant Attorney General, for respondent. Reported below: 218 S.W. 2d 195.

No. 297. RITTER *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Marvin J. Sternberg* for petitioner. *A. E. Funk*, Attorney General of Kentucky, and *H. D. Reed, Jr.*, Assistant Attorney General, for respondent. Reported below: 310 Ky. 638, 221 S. W. 2d 432.

No. 301. S/A INDUSTRIAS REUNIDAS F. MATARAZZO *v.* LATIMER. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Leonard G. Bisco* for petitioner. *Thomas F. Daly* for respondent. Reported below: 175 F. 2d 184.

No. 303. SELLERS ET AL. *v.* STANOLIND OIL & GAS CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Duke Duvall, William E. Leahy* and *William J. Hughes, Jr.* for petitioners. *Ray S. Fellows, Weymouth Kirkland* and *Howard Ellis* for respondent. Reported below: 174 F. 2d 948.

No. 304. PAPER CONTAINER MFG. CO. *v.* DIXIE CUP CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Franklin M. Warden, James C. Leaton* and *Casper W. Ooms* for petitioner. *Carlton Hill* and *Thomas L. Marshall* for respondent. Reported below: 174 F. 2d 834.

No. 305. SMITH *v.* MCLANE ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Martin A. Schenck* and *Kenneth W. Greenawalt* for petitioner. *William H. Eckert* for respondents. Reported below: 174 F. 2d 819.

No. 310. CENTRAL ELECTRIC & GAS CO. *v.* MATTSON, ADMINISTRATOR, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Max Kier* for petitioner. *Robert A. Nelson* for respondents. Reported below: 174 F. 2d 215.

No. 311. SORRENTINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *David Berger* and *Thomas D. McBride* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell,* and *Robert S. Erdahl* for the United States. Reported below: 175 F. 2d 721.

No. 312. ZANZONICO *v.* ZANZONICO, EXECUTOR, ET AL. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Frank B. Bozza* for petitioner. *Ward J. Herbert* for respondents. Reported below: 2 N. J. 309, 66 A. 2d 530.

No. 314. PACIFIC-ATLANTIC STEAMSHIP CO. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Robert S. Erskine* and *Leonard J. Matteson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *John R. Benney* for the United States. Reported below: 175 F. 2d 632.

No. 315. AMERICAN EASTERN CORP. *v.* MCCARTHY. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Thomas E. Byrne, Jr.* for petitioner. Reported below: 175 F. 2d 724.

No. 321. SCHMITT ET AL. *v.* WAR EMERGENCY PIPELINES, INC. ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Shields M. Goodwin* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondents. Reported below: 175 F. 2d 335.

No. 322. FAWCETT PUBLICATIONS, INC. *v.* BRONZE PUBLICATIONS, INC. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *W. O. Mehrtens* for petitioner. Reported below: 174 F. 2d 646.

No. 325. SMITH ET AL. *v.* GENERAL FOUNDRY MACHINE CO., INC. ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Clarence M. Fisher* and *W. Brown Morton* for petitioners. *Lycurgus R. Varser* and *Warley L. Parrott* for respondents. Reported below: 174 F. 2d 147.

No. 327. GUSSIE *v.* PENNSYLVANIA RAILROAD CO. Appellate Division of the Superior Court of New Jersey. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Isidore Hornstein* for petitioner. *Edward J. O'Mara* for respondent. Reported below: 1 N. J. Super. 293, 64 A. 2d 244.

No. 328. CHRISTY *v.* CONVER ET AL., CONSTITUTING THE MONTGOMERY COUNTY BOARD OF LAW EXAMINERS. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Laurence H. Eldredge* for petitioner. *Joseph Knox Fornance* for respondents. Reported below: 362 Pa. 347, 67 A. 2d 85.

No. 329. KLEIN *v.* UNITED STATES; and

No. 330. BURKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Walter A. Raymond* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 176 F. 2d 184.

No. 331. BERNARD EDWARD CO. *v.* FALKENBERG. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Will Freeman* for petitioner. *Albert R. Teare* for respondent. Reported below: 175 F. 2d 427.

No. 333. UNITED STATES *v.* CONTINENTAL-AMERICAN BANK & TRUST CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *Charles D. Egan* for respondents. Reported below: 175 F. 2d 271.

No. 343. BRISTER & KOESTER LUMBER CORP. *v.* TURNEY, DIRECTOR, DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE. United States Emergency Court of Appeals. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Arthur G. Warner* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Israel Convisser* for respondent. Reported below: 176 F. 2d 843.

No. 345. JOY ET AL. *v.* HAGUE ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Claude L. Dawson* for petitioners. *Solicitor General Perlman,*

Assistant Attorney General Morison and *Morton Liftin* for respondents. Reported below: 175 F. 2d 395.

No. 351. AMERICAN DREDGING CO. *v.* UNITED STATES; and

No. 352. AMERICAN DREDGING CO. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Joseph W. Henderson* and *Edward F. Platow* for petitioner in No. 351. *Benjamin F. Stahl, Jr.* and *Samuel B. Fortenbaugh, Jr.* for petitioner in No. 352. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for the United States. Reported below: 175 F. 2d 556.

No. 356. TAYLOR *v.* MUNICIPAL COURT OF LOS ANGELES ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Arthur E. T. Chapman* for petitioner. *Ray L. Chesebro* and *Bourke Jones* for respondents.

No. 386. NATIONAL LEAD CO. *v.* SCHUFT ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *George J. Danforth* for petitioner. *H. F. Fellows* for respondents. Reported below: 176 F. 2d 610.

Nos. 168 and 169. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Welly K. Hopkins, Harrison Combs, T. C. Town-*

send and *M. E. Boiarsky* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Liftin* for the United States. *Arthur J. Goldberg* and *Thomas E. Harris* filed a brief for the Congress of Industrial Organizations, as *amicus curiae,* supporting the petition. Reported below: 85 U. S. App. D. C. 149, 177 F. 2d 29.

No. 182. Brotherhood of Locomotive Engineers et al. *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *Carl McFarland, Ashley Sellers* and *Kenneth L. Kimble* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, John R. Benney* and *Morton Liftin* for the United States. Reported below: 85 U. S. App. D. C. 417, 174 F. 2d 160.

No. 307. Eitel-McCullough, Inc. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this application. *Richard Edward Hale Julien* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for respondent. Reported below: 175 F. 2d 438.

No. 308. United States ex rel. Hoehn *v.* Shaughnessy, District Director of Immigration and Naturalization. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this application. *George W. Riley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Israel Convisser* for respondent. Reported below: 175 F. 2d 116.

No. 313. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. The motion of Billie Leonard Moore to join in the petition for the writ is denied. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Arthur J. Mandell* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. *Hugh Carney* was on the motion of Moore. Reported below: 175 F. 2d 384.

No. 316. BERNSTEIN *v.* EMS CORPORATION. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Barent Ten Eyck* and *Victor Brudney* for petitioner. *I. Maurice Wormser* for respondent. Reported below: 174 F. 2d 880.

No. 346. KAMINER *v.* CLARK, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. McGrath substituted as a party respondent for Clark. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Jack Wasserman, Irving Jaffe, Gaspare Cusumano* and *Thomas M. Cooley, II,* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl, John R. Benney* and *Philip R. Monahan* for respondents. Reported below: 85 U. S. App. D. C. 205, 177 F. 2d 51.

No. 3, Misc. GRAYSON *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Petitioner *pro se*. *Price Daniel,* Attorney General of Texas, *Joe R. Greenhill,* First As-

sistant Attorney General, and *Frank Lake*, Assistant Attorney General, for respondent. Reported below: 217 S. W. 2d 1007.

No. 7, Misc. HUGHES *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 15, Misc. SLAUGHTER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 84 U. S. App. D. C. 232, 172 F. 2d 281.

No. 16, Misc. MONTALVO *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 174 F. 2d 645.

No. 18, Misc. JORDAN *v.* OVERHOLSER, SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 24, Misc. CARROLL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 174 F. 2d 412.

No. 59, Misc. EDELSON *v.* THOMPSON, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 64, Misc. DOLL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no

part in the consideration or decision of this application. Reported below: 175 F. 2d 884.

No. 70, Misc. TABOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 175 F. 2d 553.

No. 75, Misc. DELANEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 80, Misc. MCCANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 175 F. 2d 445.

No. 116, Misc. MCCANN ET AL. *v.* CLARK, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 121, Misc. MCCANN ET AL. *v.* CLARK, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 126, Misc. MCCANN *v.* CLARK, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 131, Misc. MCCANN *v.* CLARK, ATTORNEY GENERAL. United States Court of Appeals for the District of

Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 157, Misc. MCCANN *v.* CLARK, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 82, Misc. MCINTOSH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 176 F. 2d 514.

No. 85, Misc. BERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 176 F. 2d 122.

No. 129, Misc. REID *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Robert L. Carter* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 230 N. C. 561, 53 S. E. 2d 849.

No. 162, Misc. MAYO *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 167, Misc. REEDER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 172, Misc. SCARPINATO *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

NOVEMBER 9, 1949.

Miscellaneous Order.

No. 313. WRIGHT *v.* UNITED STATES, 338 U. S. 873. Motion to stay order denying writ of certiorari denied.

NOVEMBER 14, 1949.*

Per Curiam Decision.

No. 421. GOODLEY *v.* CALIFORNIA. Appeal from the Appellate Department of the Superior Court in and for the County of Los Angeles, California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question.

Miscellaneous Orders.

No. 88, Misc. WEDGLE *v.* UNITED STATES. The motion for leave to file petition for writ of certiorari is denied.

No. 178, Misc. FURMAN *v.* RAGEN, WARDEN. The motion for leave to file petition for writ of habeas corpus is denied.

Certiorari Granted.

No. 306. JOHNSON, SECRETARY OF DEFENSE, ET AL. *v.* EISENTRAGER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioners. *A. Frank*

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

Reel, Milton Sandberg and *Wallace M. Cohen* for respondents. Reported below: 84 U. S. App. D. C. 396, 174 F. 2d 961.

Certiorari Denied. (*See also No. 88, Misc., supra.*)

No. 21. ROTH, ATTORNEY GENERAL, *v.* DELANO, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 6th Cir. Certiorari denied. *Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *Archie C. Fraser,* Assistant Attorney General, and *Julius H. Amberg* for petitioner. *Robert S. Marx* for respondents. Reported below: 170 F. 2d 966.

No. 162. BRANTON *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Thurman L. Dodson* for petitioner. *Ike Murry,* Attorney General of Arkansas, *Jeff Duty* and *Wyatt Cleveland Holland,* Assistant Attorneys General, for respondent. Reported below: 214 Ark. 861, 218 S. W. 2d 690.

Nos. 347, 348 and 349. SCHOOL DISTRICT OF THE BOROUGH OF CENTERVILLE *v.* JONES & LAUGHLIN STEEL CORP. Supreme Court of Pennsylvania. Certiorari denied. *James C. Bane* for petitioner. *Ralph H. Demmler* for respondent. Reported below: 362 Pa. 400, 67 A. 2d 378.

No. 357. DECKER ET AL., DOING BUSINESS AS DECKER PRODUCTS CO., *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harry S. Hall* and *J. C. Trimble* for petitioners. *Solicitor General Perlman, Assistant Attorney General Bergson, J. Roger Wollenberg* and *W. T. Kelley* for respondent. Reported below: 176 F. 2d 461.

No. 360. RICE GROWERS ASSOCIATION OF CALIFORNIA *v.* REDERIAKTIEBOLAGET FRODE (A CORPORATION). C. A.

9th Cir. Certiorari denied. *George H. Hauerken* for petitioner. *Clarence G. Morse* for respondent. Reported below: 176 F. 2d 401.

No. 317. FLICK *v.* JOHNSON, SECRETARY OF DEFENSE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Joseph S. Robinson, Earl J. Carroll, George T. Davis, Fred W. Shields, James D. Graham, Jr.* and *Dayton M. Harrington* for petitioner. *Solicitor General Perlman* for respondents. Reported below: 85 U. S. App. D. C. 70, 174 F. 2d 983.

No. 340. OLDFIELD *v.* THE ARTHUR P. FAIRFIELD ET AL. C. A. 9th Cir. Certiorari denied. *Kneland C. Tanner* and *Edwin J. Friedman* for petitioner. Reported below: 176 F. 2d 429.

No. 366. POTASH *v.* CLARK, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. McGrath substituted as a party respondent for Clark. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Lee Pressman, Joseph Forer, David Rein, Carol King* and *William L. Standard* for petitioner. *Solicitor General Perlman* for respondents.

No. 23, Misc. COLTON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 89, Misc. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92, Misc. PICKENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 175 F. 2d 437.

No. 98, Misc. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 170 F. 2d 140.

No. 101, Misc. KWASIZUR, ADMINISTRATRIX, *v.* CARDILLO, DEPUTY COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. *E. Herman Fuiman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Joseph Kovner* for Cardillo; and *Bertram Bennett* for the Maritime Ship Cleaning & Maintenance Co. et al., respondents. Reported below: 175 F. 2d 235.

No. 118, Misc. COUNCIL *v.* CLEMMER, DIRECTOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 85 U. S. App. D. C. 74, 177 F. 2d 22.

No. 119, Misc. MINTON *v.* BRITTON, DEPUTY COMMISSIONER, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert H. McNeill* and *Harold L. Schilz* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Joseph Kovner* for Britton, respondent. Reported below: 85 U. S. App. D. C. 423, 176 F. 2d 71.

No. 165, Misc. KELLY *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Reported below: 120 Colo. 1, 206 P. 2d 337.

No. 169, Misc. GIBBS *v.* ASHE, WARDEN. Superior Court of Pennsylvania. Certiorari denied. Reported below: 165 Pa. Super. 35, 67 A. 2d 773.

No. 175, Misc. PERKINS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 177, Misc. CAVANAUGH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 182, Misc. REEDER *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 187, Misc. HALL *v.* ROBINSON, WARDEN. Circuit Court of Macon County, Illinois. Certiorari denied.

No. 189, Misc. COGGINS *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. Reported below: 324 Mass. 552, 87 N. E. 2d 200.

Rehearing Denied.

No. 80. HODGE ET AL. *v.* FIRST PRESBYTERIAN CHURCH, *ante*, p. 815. Rehearing denied.

No. 92. TURNER GLASS CORP. *v.* HARTFORD-EMPIRE CO. ET AL., *ante*, p. 830. Rehearing denied.

No. 148. HASS *v.* NEW YORK, *ante*, p. 803. Rehearing denied.

No. 160. LAVENDER, ADMINISTRATOR, *v.* ILLINOIS CENTRAL RAILROAD CO., *ante*, p. 822. Rehearing denied.

No. 172. SCHUERMANN *v.* UNITED STATES, *ante*, p. 831. Rehearing denied.

No. 199. WALSH, SHERIFF, *v.* UNITED STATES EX REL. WHITE, *ante*, p. 804. Rehearing denied.

No. 210. AUBURN SAVINGS BANK ET AL. *v.* PORTLAND RAILROAD CO. ET AL., *ante*, p. 831. Rehearing denied.

No. 222. ROBINSON *v.* UNITED STATES; and

No. 223. BLEKER *v.* UNITED STATES, *ante*, p. 832. Rehearing denied.

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No. 225. ANDREW JERGENS CO. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 827. Rehearing denied.

No. 247. GIBSON *v.* INTERNATIONAL FREIGHTING CORP., *ante*, p. 832. Rehearing denied.

No. 250. BINGAMAN, ADMINISTRATOR, *v.* REHN ET AL., DOING BUSINESS AS JOHN P. MAINELLI CONSTRUCTION CO., *ante*, p. 806. Rehearing denied.

No. 260. POTTS ET AL. *v.* RADER, ADMINISTRATOR, ET AL., *ante*, p. 849. Rehearing denied.

No. 261. COBB *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 832. Rehearing denied.

No. 290. PAYNE *v.* UNITED STATES, *ante*, p. 861. Rehearing denied.

No. 83, Misc. EX PARTE NEWSTEAD, *ante*, p. 809. Rehearing denied.

No. 112, Misc. ISRAEL ET AL. *v.* CALIFORNIA, *ante*, p. 838. Rehearing denied.

No. 120, Misc. GOODMAN *v.* IOWA, *ante*, p. 838. Rehearing denied.

No. 598, Misc., October Term, 1948. SHOTKIN ET AL. *v.* DENVER PUBLISHING CO. ET AL., 337 U. S. 929. Second petition for rehearing denied.

No. 100. MAY *v.* UNITED STATES;

No. 101. GARSSON *v.* UNITED STATES; and

No. 102. GARSSON *v.* UNITED STATES, *ante*, p. 830. The petitions for rehearing in these cases are denied. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

NOVEMBER 21, 1949.

Per Curiam Decisions.

No. 255, October Term, 1948. EISLER *v.* UNITED STATES. Certiorari, 335 U. S. 857, to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The motion to dismiss is granted and the writ of certiorari is dismissed. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Solicitor General Perlman* was on the motion to dismiss for the United States. *David Rein* and *Joseph Forer* were on a memorandum opposing the motion for petitioner. Reported below: 83 U. S. App. D. C. 315, 170 F. 2d 273.

No. 126. COMMISSIONER OF INTERNAL REVENUE *v.* PHILADELPHIA TRANSPORTATION CO. Certiorari, *ante,* p. 810, to the United States Court of Appeals for the Third Circuit. Argued November 18, 1949. Decided November 21, 1949. *Per Curiam:* The judgment is affirmed. MR. JUSTICE BURTON dissents. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Arnold Raum* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Hilbert P. Zarky. William R. Spofford* argued the cause for respondent. With him on the brief were *Frederic L. Ballard* and *Sherwin T. McDowell.* Reported below: 174 F. 2d 255.

Miscellaneous Orders.

No. 3. UNITED STATES EX REL. EICHENLAUB *v.* SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. The motion to withdraw the appearance of Charles Edwin Wallington as counsel for the petitioner is granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 103. ESTATE OF SCHROEDER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. On consideration of the motion of the petitioners for a clarification of the order of October 10, *ante,* p. 801, the order is amended to read as follows: "*Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for further consideration in the light of T. D. 5741, 14 Fed. Reg. 5536; the Technical Changes Act of October 25, 1949, 63 Stat. 891; and *Commissioner* v. *Estate of Church,* 335 U. S. 632, and *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701." MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 201, Misc. HULL *v.* FRISBIE, WARDEN;
No. 212, Misc. MACKENNA *v.* SNYDER, WARDEN;
No. 213, Misc. LANCOUR *v.* MICHIGAN;
No. 214, Misc. HEICHT *v.* MARYLAND; and
No. 215, Misc. CRUSE *v.* RAGEN, WARDEN. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 188, Misc. IN RE BUERGER. The application is denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

Certiorari Granted.

No. 293. UNITED STATES *v.* RABINOWITZ. C. A. 2d Cir. Certiorari granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. Reported below: 176 F. 2d 732.

Certiorari Denied.

No. 229. CAPITAL AIRLINES, INC. *v.* EDWARDS ET AL.; and

No. 371. EDWARDS ET AL. *v.* CAPITAL AIRLINES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles H. Murchison* for petitioner in No. 229. *Howard C. Westwood, Edwin McElwain* and *Amy Ruth Mahin* for petitioners in No. 371 and respondents in No. 229. Reported below: 84 U. S. App. D. C. 346, 176 F. 2d 755.

No. 361. WILSON ET AL. *v.* STATE EX REL. MCGEE, TREASURER AND EX-OFFICIO COLLECTOR, ET AL. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Bon Geaslin* for petitioners. *David Baron* for McGee, respondent. Reported below: 358 Mo. 1244, 220 S. W. 2d 6.

No. 367. PORTER *v.* JONES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *T. Austin Gavin* for petitioner. Reported below: 176 F. 2d 87.

No. 372. UNITED STATES *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *John P. McGrath* for respondent. Reported below: 175 F. 2d 75.

No. 387. CASEY, ADMINISTRATRIX, *v.* AMERICAN EXPORT LINES, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Jacob Rassner* for petitioner.

Kenneth Gardner and *Edgar R. Kraetzer* for respondent. Reported below: 176 F. 2d 337.

No. 411. CAULDWELL-WINGATE CO., INC. ET AL. *v.* PERSON, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *William A. Davidson* for petitioners. *Louis A. D'Agosto* for respondent. Reported below: 176 F. 2d 237.

No. 354. SUGARMAN *v.* CALIFORNIA. District Court of Appeal, 3d Appellate District, of California. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Morris Lavine* and *Max Willens* for petitioner. *Fred N. Howser,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent. Reported below: 91 Cal. App. 2d 695, 205 P. 2d 1065.

No. 355. SUGARMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Morris Lavine* and *Max Willens* for petitioner. *Fred N. Howser,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 362. RABINOWITZ *v.* UNITED STATES. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is denied for the reason that application therefor was not made within the time provided by law. Rule 37 (b) (2) of the Rules of Criminal Procedure. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Arthur*

Levitt and *Abraham Lillienthal* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 176 F. 2d 732.

No. 105, Misc. KEITH *v.* MILLER, WARDEN. Supreme Court of Wyoming. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Petitioner *pro se*. *Norman B. Gray,* Attorney General of Wyoming, *Marion R. Smyser,* Deputy Attorney General, and *Harry A. Thompson,* Assistant Attorney General, for respondent.

No. 181, Misc. CALDWELL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 184, Misc. PAUGH *v.* FRISBIE, WARDEN. Supreme Court of Michigan. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 198, Misc. LANTZ *v.* MILLER, WARDEN. District Court of Rawlins County, Wyoming. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 199, Misc. DONOVAN *v.* NEW HAMPSHIRE. Supreme Court of New Hampshire. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 200, Misc. BYERS *v.* CITIES SERVICE GAS CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 176 F. 2d 548.

No. 203, Misc. LYLE *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 205, Misc. DAYTON *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 176 F. 2d 108.

No. 206, Misc. SPENCE *v.* INDIANA ET AL. Criminal Court of Cook County, Illinois. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 208, Misc. MONAGHAN *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 211, Misc. JACKSON *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

Rehearing Denied.

No. 244. SECURITIES & EXCHANGE COMMISSION ET AL. *v.* OTIS & CO., *ante*, p. 843;

No. 284. LAPIDES *v.* MCGRATH, ATTORNEY GENERAL, ET AL., *ante*, p. 860;

No. 319. PRICE *v.* MISSISSIPPI, *ante*, p. 844;

No. 57, Misc. SIMMONS *v.* PENNSYLVANIA, *ante*, p. 862;

No. 155, Misc. RHEIM *v.* FOSTER, WARDEN, *ante*, p. 857; and

No. 156, Misc. BARMORE *v.* FOSTER, WARDEN, *ante*, p. 862. The petitions for rehearing in these cases are severally denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 788, October Term, 1948. LATTA ET AL. *v.* WESTERN INVESTMENT CO. ET AL. The motion for leave to file petition for rehearing is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

DECEMBER 5, 1949.*

Miscellaneous Orders.

No. 185, Misc. BREWER *v.* FRISBIE, WARDEN; and

No. 216, Misc. RUTHVEN *v.* OVERHOLSER. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 209, Misc. NEW JERSEY STATE SOCIETY OF NATUROPATHS ET AL. *v.* FORMAN, JUDGE. The motion for leave to file petition for writ of mandamus is denied. *Meyer M. Semel* for petitioners.

No. 225, Misc. UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS ET AL. The motion for leave to file petition for writ of mandamus is denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Perlman, Assistant Attorney General Bergson, Holmes Baldridge* and *Beatrice Rosenberg* for the United States.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which orders were this day announced.

Certiorari Granted.

No. 359. HIATT, WARDEN, *v.* BROWN. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Walter G. Cooper* for respondent. Reported below: 175 F. 2d 273.

No. 384. COMMISSIONER OF INTERNAL REVENUE *v.* KORELL. C. A. 2d Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Paul L. Peyton* for respondent. Reported below: 176 F. 2d 152.

No. 403. REIDER *v.* THOMPSON, TRUSTEE. C. A. 5th Cir. Certiorari granted. *Eberhard P. Deutsch* for petitioner. Reported below: 176 F. 2d 13.

No. 373. COHNSTAEDT *v.* IMMIGRATION & NATURALIZATION SERVICE OF THE U. S. DEPARTMENT OF JUSTICE. Supreme Court of Kansas. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Osmond K. Fraenkel* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Campbell* for respondent. Reported below: 167 Kan. 451, 207 P. 2d 425.

No. 391. SLOCUM, GENERAL CHAIRMAN, DIVISION NO. 30, ORDER OF RAILROAD TELEGRAPHERS, *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. Court of Appeals of New York. Certiorari granted. *Leo J. Hassenauer* and *Manly Fleischmann* for petitioner. *Rowland L. Davis, Jr.* and *Halsey Sayles* for respondent. Reported below: 299 N. Y. 496, 87 N. E. 2d 532.

Certiorari Denied.

No. 335. WHITCOMB ET AL. *v.* CLARK, DRAIN COMMISSIONER, ET AL. Supreme Court of Michigan. Certiorari denied. *Lee E. Joslyn* and *Irvin Long* for petitioners.

Stephen J. Roth, Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara* and *Ernest O. Zirkalos,* Assistant Attorneys General, for respondents. Reported below: 325 Mich. 298, 38 N. W. 2d 413.

No. 350. UNITED STATES *v.* WALKER. C. A. 2d Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Peter L. F. Sabbatino* and *Thomas J. Todarelli* for respondent. Reported below: 176 F. 2d 564.

No. 383. GILSON BROTHERS *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD. Supreme Court of Wisconsin. Certiorari denied. *Clark M. Robertson* and *Howard R. Johnson* for petitioner. *Thomas E. Fairchild,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General, and *Beatrice Lampert,* Assistant Attorney General, for respondent. *Solicitor General Perlman* and *Robert N. Denham* filed a brief for the National Labor Relations Board, as *amicus curiae,* supporting the petition. Reported below: 255 Wis. 316, 38 N. W. 2d 492.

No. 385. DISTRICT OF COLUMBIA *v.* HAMILTON NATIONAL BANK OF WASHINGTON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray, George C. Updegraff* and *Harry L. Walker* for petitioner. *Roger J. Whiteford, John J. Wilson* and *Philip S. Peyser* for respondent. Reported below: 85 U. S. App. D. C. 109, 176 F. 2d 624.

No. 401. DISTRICT OF COLUMBIA *v.* BANK OF COMMERCE & SAVINGS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray, George C. Updegraff*

and *Harry L. Walker* for petitioner. *Jo V. Morgan, William F. Kelly, P. J. J. Nicolaides, Samuel O. Clark, Jr., W. V. T. Justis* and *George E. C. Hayes* for the Bank of Commerce & Savings et al.; and *Nelson T. Hartson, James C. Rogers* and *O. R. McGuire, Jr.* for the Citizens Bank of Washington, respondents. Reported below: 85 U. S. App. D. C. 109, 176 F. 2d 624.

No. 390. KITCHENS *v.* BIRD ET AL. Supreme Court of Arkansas. Certiorari denied. *J. R. Wilson* for petitioner. *J. E. Gaughan* for respondents. Reported below: 215 Ark. 609, 221 S. W. 2d 795.

No. 404. ENDICOTT JOHNSON CORP. *v.* LANE, PRESIDENT, LEATHER WORKERS' UNION, LOCAL 285. Supreme Court of New York, Broome County. Certiorari denied. *Howard A. Swartwood* for petitioner. *Nathan Witt* for respondent. Reported below: See 299 N. Y. 725, 87 N. E. 2d 450.

No. 405. PLACEK ET AL. *v.* EDSTROM, COUNTY ATTORNEY. Supreme Court of Nebraska. Certiorari denied. *C. Petrus Peterson* for petitioners. Reported below: 151 Neb. 225, 37 N. W. 2d 203.

No. 409. MIDLAND STEEL PRODUCTS CO. *v.* CLARK EQUIPMENT CO. C. A. 6th Cir. Certiorari denied. *F. O. Richey* and *H. F. McNenny* for petitioner. *John A. Dienner* and *Edward C. Grelle* for respondent. Reported below: 174 F. 2d 541.

No. 414. BRADSHAW *v.* THE VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. *R. Arthur Jett* for petitioner. *Charles W. Hagen* and *Edward R. Baird* for the Chesapeake & Ohio Railway Co., respondent. Reported below: 176 F. 2d 526.

No. 420. STEIGLEDER *v.* EBERHARD FABER PENCIL CO. ET AL. C. A. 1st Cir. Certiorari denied. *Herbert S. Avery* for petitioner. *Herbert W. Kenway, Raymond L. Greist* and *J. Bernhard Thiess* for respondents. Reported below: 176 F. 2d 604.

No. 368. ROSENBLUM *v.* UNITED STATES;
No. 369. STRYK *v.* UNITED STATES; and
No. 370. WEISS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MINTON took no part in the consideration or decision of this application. *Albert Ward, Palmer K. Ward* and *William B. Harrell* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney, Ellis N. Slack* and *John H. Mitchell* for the United States. Reported below: 176 F. 2d 321.

No. 382. BELSER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Irvine F. Belser, Carlisle Roberts, W. Croft Jennings, C. T. Graydon* and *W. S. Pritchard* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman* for respondent. Reported below: 174 F. 2d 386.

No. 392. CHARLES L. HARNEY CONSTRUCTION CO. (FORMERLY PALM SPRINGS HOLDING CORP.) *v.* FLEMING, ADMINISTRATOR, FEDERAL WORKS AGENCY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Larson, Administrator of General Services, substituted as the party respondent. Certiorari denied. *Harold Leventhal, David B. Gideon* and *John J. Courtney* for petitioner. *Solicitor General Perlman, Assistant At-*

torney General Vanech, Roger P. Marquis and *Fred W. Smith* for respondents. Reported below: 85 U. S. App. D. C. 219, 177 F. 2d 65.

No. 400. FIFTH & WALNUT, INC. ET AL. *v.* LOEW'S INC. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Monroe E. Stein* and *Maurice A. Gellis* for petitioners. *Louis D. Frohlich, Robert W. Perkins, Edward C. Raftery* and *John F. Caskey* for respondents. Reported below: 176 F. 2d 587.

No. 415. BUZZI *v.* BUZZI. Supreme Court of California. Certiorari denied. *Edward E. Petrillo* for petitioner. *W. I. Gilbert, Jr.* for respondent.

No. 365. KOFOUROS ET AL. *v.* GIANNOUTSOS ET AL. C. A. 4th Cir. Certiorari denied. *Jacob L. Morewitz* for petitioners. Reported below: 174 F. 2d 477.

No. 388. KORTHINOS ET AL. *v.* NIARCHOS ET AL.; and

No. 407. NIARCHOS ET AL. *v.* KORTHINOS ET AL. C. A. 4th Cir. Certiorari denied. *Jacob L. Morewitz* for petitioners in No. 388. *George M. Lanning* and *Barron F. Black* for petitioners in No. 407. *Mr. Black* and *Hugh S. Meredith* for respondents in No. 388. Reported below: 175 F. 2d 730, 734.

No. 389. MALEURIS ET AL. *v.* PAPADAKIS ET AL.; and

No. 408. PAPADAKIS ET AL. *v.* MALEURIS ET AL. C. A. 4th Cir. Certiorari denied. *Jacob L. Morewitz* for petitioners in No. 389. *Leon T. Seawell* and *Thomas M. Johnston* for petitioners in No. 408 and respondents in No. 389. Reported below: 175 F. 2d 730, 734.

No. 79, Misc. CHAMBERS *v.* UNITED STATES. C. A. 5th and 8th Cir. Certiorari denied.

No. 108, Misc. ADKINS, ADMINISTRATRIX, *v.* E. I. DU PONT DE NEMOURS & Co., INC. ET AL. C. A. 10th Cir. Certiorari denied. *John W. Porter, Jr.* for petitioner. *Solicitor General Perlman* for the United States; and *Peter B. Collins, G. C. Spillers* and *G. C. Spillers, Jr.* for Du Pont & Co., respondents. Reported below: 176 F. 2d 661.

No. 110, Misc. DUNLAP *v.* HANNAY, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 150, Misc. RODINCIUC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Charles Lakatos* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Leavenworth Colby* for the United States. Reported below: 175 F. 2d 479.

No. 171, Misc. BARKER *v.* SHARP ET AL. Supreme Court of Minnesota. Certiorari denied. Reported below: 229 Minn. 152, 38 N. W. 2d 221.

No. 210, Misc. MURPHEY ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Ernest Spagnoli* for petitioners. Reported below: 34 Cal. 2d 234, 209 P. 2d 385.

No. 218, Misc. JULIANE *v.* NEW YORK. Supreme Court of New York. Certiorari denied.

No. 220, Misc. BEYERS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 229, Misc. PHYLE *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 34 Cal. 2d 144, 208 P. 2d 668.

Rehearing Denied.

No. 19. FAULKNER *v.* GIBBS, *ante*, p. 267. Rehearing denied.

No. 139. MARIO MERCADO E HIJOS *v.* BRANNAN, SECRETARY OF AGRICULTURE, *ante*, p. 820. Rehearing denied.

No. 170. PARK-IN THEATRES, INC. *v.* LOEW'S DRIVE-IN THEATRES, INC., *ante*, p. 822. Rehearing denied.

No. 263. BENT ET AL. *v.* UNITED STATES, *ante*, p. 829. Rehearing denied.

No. 310. CENTRAL ELECTRIC & GAS CO. *v.* MATTSON, ADMINISTRATOR, ET AL., *ante*, p. 868. Rehearing denied.

No. 311. SORRENTINO *v.* UNITED STATES, *ante*, p. 868. Rehearing denied.

No. 332. DYE, WARDEN, *v.* JOHNSON ET AL., *ante*, p. 863. Rehearing denied.

No. 342. VINSONHALER ET AL., DOING BUSINESS AS KGHI BROADCASTING SERVICE, ET AL. *v.* BEARD, COLLECTOR, *ante*, p. 863. Rehearing denied.

No. 5, Misc. TANUZZO ET AL. *v.* UNITED STATES, *ante*, p. 815. Rehearing denied.

No. 59, Misc. EDELSON *v.* THOMPSON, WARDEN, *ante*, p. 874. Rehearing denied.

No. 81, Misc. EAGLE *v.* CHERNEY ET AL., *ante*, p. 837. Rehearing denied.

No. 174, Misc. SCHUMAN *v.* HEINZE, WARDEN, *ante*, p. 863. Rehearing denied.

DECEMBER 8, 1949.

Miscellaneous Order.

No. 263, Misc. IN RE ADAMSON. Application for a stay of execution of the sentence of death denied. MR. JUSTICE BLACK is of the opinion the application should be granted.

DECEMBER 12, 1949.*

Per Curiam Decisions.

No. 334. UNITED STATES *v.* SHORELINE COOPERATIVE APARTMENTS, INC. ET AL. Appeal from the United States District Court for the Northern District of Illinois. Argued December 7, 1949. Decided December 12, 1949. *Per Curiam:* The judgment is reversed. *Woods* v. *Miller Co.*, 333 U. S. 138. *Solicitor General Perlman* argued the cause for the United States. With him on the brief were *Robert L. Stern, Ed Dupree, Hugo V. Prucha* and *Nathan Siegel. Mayer Goldberg* and *George S. Stansell* argued the cause for appellees. *Mr. Goldberg* also filed a brief for the Shoreline Cooperative Apartments, Inc. et al., appellees. *Kenart M. Rahn* was with *Mr. Stansell* on the brief for Lumsden et al., appellees. Reported below: 84 F. Supp. 660.

No. 447. LAND O'LAKES DAIRY CO. *v.* COUNTY OF WADENA ET AL. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558; *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342. *Michael J. Doherty* and *Harold Jordan* for appellant. *J. A. A. Burnquist,* Attorney General of Minnesota, *Geo. B. Sjoselius,* Deputy Attorney

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which orders or judgments were this day announced.

General, and *Chas. P. Stone,* Assistant Attorney General, for appellees. Reported below: 229 Minn. 263, 39 N. W. 2d 164.

Miscellaneous Orders.

No. 60. KRUG, SECRETARY OF THE INTERIOR, *v.* SHERIDAN-WYOMING COAL CO., INC. Chapman substituted for Krug as the party petitioner.

No. 179, Misc. INDEPENDENCE LEAD MINES CO. *v.* KINGSBURY ET AL. The motion for leave to file petition for writ of certiorari is denied. *William E. Cullen* and *James A. Murray* for petitioner. *J. K. Cheadle* for respondents.

No. 186, Misc. EDGEMAN *v.* ALVIS, WARDEN;
No. 231, Misc. WEDGLE *v.* UNITED STATES;
No. 234, Misc. IN RE WHISTLER; and
No. 248, Misc. VAN PELT *v.* RAGEN, WARDEN. The motions for leave to file petitions for writs of habeas corpus are severally denied.

No. 226, Misc. NEWSTEAD *v.* OVERHOLSER. The motion for leave to file petition for writ of mandamus is denied.

Certiorari Granted.

No. 419. PLANKINTON PACKING CO. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. Supreme Court of Wisconsin. Certiorari granted. *T. H. Spence* for petitioner. *Thomas E. Fairchild,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General, and *Beatrice Lampert,* Assistant Attorney General, for the Wisconsin Employment Relations Board; *Max Raskin* for the United Packing House Workers (C. I. O.); and William Stokes, *pro se,* respondents. *Solicitor Gen-*

eral Perlman and *Robert N. Denham* filed a memorandum for the National Labor Relations Board, as *amicus curiae,* supporting the petition. Reported below: 255 Wis. 285, 38 N. W. 2d 688.

No. 438. Order of Railway Conductors of America *v.* Southern Railway Co. Supreme Court of South Carolina. Certiorari granted. *V. C. Shuttleworth, Harry E. Wilmarth* and *Frederick H. Horlbeck* for petitioner. *Nath B. Barnwell, Frank G. Tompkins, Henry L. Walker, W. S. Macgill* and *Sidney S. Alderman* for respondent. Reported below: 215 S. C. 280, 54 S. E. 2d 816.

Certiorari Denied. (See also No. 179, Misc., supra.)

No. 410. Ryan Stevedoring Co., Inc. *v.* United States. C. A. 2d Cir. Certiorari denied. *John C. Crawley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Leavenworth Colby* for the United States. Reported below: 175 F. 2d 490.

No. 412. Shields et al. *v.* United States et al. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for respondents. Reported below: 175 F. 2d 743.

No. 413. National Labor Relations Board *v.* Ohio Power Co. C. A. 6th Cir. Certiorari denied. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. *Ralph W. Wilkins* for respondent. Reported below: 176 F. 2d 385.

No. 423. Interstate Equipment Corp. *v.* Hartford Accident & Indemnity Co., to the use of Silva et al.

C. A. 3d Cir. Certiorari denied. *Charles Danzig* for petitioner. *Harry V. Osborne, Jr.* for respondent. Reported below: 176 F. 2d 419.

No. 424. INTERSTATE EQUIPMENT CORP. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. *Charles Danzig* for petitioner. *Harry V. Osborne, Jr.* for respondents. Reported below: 176 F. 2d 419.

No. 425. HOMEWORKERS' HANDICRAFT COOPERATIVE ET AL. *v.* McCOMB, WAGE & HOUR ADMINISTRATOR. C. A. 4th Cir. Certiorari denied. *Thornton H. Brooks* for petitioners. *Solicitor General Perlman, William S. Tyson* and *Bessie Margolin* for respondent. Reported below: 176 F. 2d 633.

No. 437. BARUCH *v.* BEECH AIRCRAFT CORP. C. A. 10th Cir. Certiorari denied. *Mark H. Adams* for petitioner. *Claude I. Depew* and *W. E. Stanley* for respondent. Reported below: 175 F. 2d 1.

No. 358. CASSELMAN ET AL. *v.* IDAHO. Supreme Court of Idaho. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE BURTON are of the opinion certiorari should be granted. *Arthur J. Goldberg* for petitioners. Reported below: 69 Idaho 237, 205 P. 2d 1131.

No. 406. INDEPENDENCE LEAD MINES CO. *v.* KINGSBURY ET AL. C. A. 9th Cir. Certiorari denied. *William E. Cullen* and *James A. Murray* for petitioner. *J. K. Cheadle* for respondents. Reported below: 175 F. 2d 983.

No. 422. LAWS, CHIEF JUDGE, ET AL., COMPRISING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *v.* CARTER. United States Court of Appeals

for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Solicitor General Perlman* for petitioners. *James A. Cobb* and *George E. C. Hayes* for respondent. Reported below: 85 U. S. App. D. C. 229, 177 F. 2d 75.

No. 138, Misc. LAMA *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 139, Misc. KOSTROW ET AL. *v.* VIRGINIA EX REL. VIRGINIA OAK TANNERY, INC. Circuit Court of Page County and Supreme Court of Appeals of Virginia. Certiorari denied. *Joseph Forer* and *David Rein* for petitioners. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, *Walter E. Rogers*, Assistant Attorney General, and *Archibald G. Robertson* for respondent.

No. 232, Misc. MURRAY *v.* ROBINSON, WARDEN. Circuit Court of Williamson County, Illinois. Certiorari denied.

Rehearing Denied.

No. 40. UNITED STATES ET AL. *v.* CAPITAL TRANSIT CO. ET AL., 338 U. S. 286. Rehearing denied.

No. 41. WASHINGTON, VIRGINIA & MARYLAND COACH CO., INC. ET AL. *v.* CAPITAL TRANSIT CO. ET AL., 338 U. S. 286. Rehearing denied.

No. 363. LYNCHBURG TRAFFIC BUREAU *v.* UNITED STATES ET AL., 338 U. S. 864. Rehearing denied.

No. 15, Misc. SLAUGHTER *v.* UNITED STATES, 338 U. S. 874. Rehearing denied.

No. 55, Misc. CASTOR *v.* UNITED STATES ET AL., 338 U. S. 836. Rehearing denied.

December 19, 1949.*

Per Curiam Decisions.

No. 464. O. C. Wiley & Sons, Inc. *v.* United States et al. Appeal from the United States District Court for the Western District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *W. G. Burnette* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellees. Reported below: 85 F. Supp. 542.

No. 473. United States *v.* Steffan. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The judgment is reversed. *United States* v. *Shoreline Cooperative Apartments,* 338 U. S. 897. *Solicitor General Perlman* for the United States.

Miscellaneous Orders.

No. 12, Original. United States *v.* Louisiana; and

No. 13, Original. United States *v.* Texas. The supplemental motion of Annie C. Lewis et al. for leave to file bill of complaint is denied. Mr. Justice Jackson and Mr. Justice Clark took no part in the consideration or decision of this application.

No. 235, Misc. Foley *v.* Major, Chief Judge, et al. The motion for leave to file petition for writ of mandamus is denied.

No. 242, Misc. Montgomery *v.* North Carolina. The motion for leave to file petition for writ of habeas corpus is denied.

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*Mr. Justice Douglas took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

No. 372, Misc., October Term, 1948. SHERMAN *v.* RAGEN, WARDEN, ET AL., 337 U. S. 235. The motion to transfer this case to the United States District Court is denied.

Certiorari Granted.

No. 449. BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 262, ET AL. *v.* GAZZAM. Supreme Court of Washington. Certiorari granted. *Daniel D. Carmell* and *Walter F. Dodd* for petitioners. Reported below: 34 Wash. 2d 38, 207 P. 2d 699.

No. 309. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS UNION, LOCAL 309, ET AL. *v.* HANKE ET AL., DOING BUSINESS AS ATLAS AUTO REBUILD. Supreme Court of Washington. Certiorari granted. *Samuel B. Bassett* for petitioners. *Clarence L. Gere* for respondents. Reported below: 33 Wash. 2d 646, 207 P. 2d 206.

No. 364. AUTOMOBILE DRIVERS & DEMONSTRATORS LOCAL UNION No. 882 ET AL. *v.* CLINE. Supreme Court of Washington. Certiorari granted. *Samuel B. Bassett* for petitioners. Reported below: 33 Wash. 2d 666, 207 P. 2d 216.

Certiorari Denied.

No. 374. MOLONEY *v.* MOLONEY (AILWORTH). Supreme Court of Kansas. Certiorari denied. *Robert Stone* for petitioner. *Oliver J. Miller* for respondent. Reported below: 167 Kan. 444, 206 P. 2d 1076.

No. 377. UNITED STATES *v.* WINTERS ET AL., DOING BUSINESS AS WILLIAM WINTERS & Co. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Malcolm A. MacIntyre* for respondents. Reported below: 114 Ct. Cl. 394, 84 F. Supp. 756.

No. 381. Gauley-Eagle Coal & Coke Co. *v.* Blair et al. Supreme Court of Appeals of West Virginia. Certiorari denied. *Brooks B. Callaghan* for petitioner. *William L. Lee* and *Thomas B. Jackson* for respondents. Reported below: 132 W. Va. ——, 54 S. E. 2d 828.

No. 429. Timmons *v.* Fagan. Supreme Court of South Carolina. Certiorari denied. Reported below: 215 S. C. 116, 54 S. E. 2d 536.

No. 430. United States ex rel. Mobley *v.* Handy, Commanding Officer. C. A. 5th Cir. Certiorari denied. *Ben F. Foster* and *William C. Davis* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for respondent. Reported below: 176 F. 2d 491.

No. 436. Morano *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Carl Abruzzese* and *Ralph G. Mesce* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Joseph W. Bishop, Jr.* and *Helen Goodner* for respondent. Reported below: 175 F. 2d 555.

No. 439. Heyman et al. *v.* Commissioner of Internal Revenue; and

No. 440. Heyman *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Thomas F. Boyle* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *S. Dee Hanson* for respondent. Reported below: 176 F. 2d 389.

Nos. 441 and 442. Arrow Stevedoring Co. *v.* United States. C. A. 9th Cir. Certiorari denied. *Lyman Henry* for petitioner. *Solicitor General Perlman, Assist-*

ant Attorney General Morison and *Paul A. Sweeney* for the United States. Reported below: 175 F. 2d 329, 333.

No. 443. TITUSVILLE DAIRY PRODUCTS CO. *v.* BRANNAN, SECRETARY OF AGRICULTURE. C. A. 3d Cir. Certiorari denied. *Willis F. Daniels* and *George H. Hafer* for petitioner. *Solicitor General Perlman, Joseph W. Bishop, Jr., J. Stephen Doyle, Jr., Neil Brooks* and *Lewis A. Sigler* for respondent. Reported below: 176 F. 2d 332.

No. 444. CALIFORNIA STATE AUTOMOBILE ASSOCIATION *v.* SMYTH, COLLECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Arthur H. Deibert* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for respondent. *Cassius E. Gates* filed a brief for the Automobile Club of the State of Washington, as *amicus curiae,* supporting the petition. Reported below: 175 F. 2d 752.

No. 446. GUY *v.* UTECHT, WARDEN. Supreme Court of Minnesota. Certiorari denied. *Harry O. Rosenberg* for petitioner. *J. A. A. Burnquist,* Attorney General of Minnesota, and *Ralph A. Stone,* Assistant Attorney General, for respondent. Reported below: 229 Minn. 58, 38 N. W. 2d 59.

No. 6, Misc. BARRIGAR *v.* ILLINOIS. Circuit Court of Adams County, Illinois. Certiorari denied. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 10, Misc. SNELL *v.* MAYO, PRISON CUSTODIAN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, *Reeves*

Bowen and *Howard S. Bailey,* Assistant Attorneys General, for respondent. Reported below: 173 F. 2d 704.

No. 44, Misc. DALTON *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Felicia H. Dubrovsky* for respondent. Reported below: 174 F. 2d 633.

No. 49, Misc. PRINCE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. J. E. Taylor,* Attorney General of Missouri, and *Gordon P. Weir,* Assistant Attorney General, for respondent.

No. 78, Misc. OWENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman* for the United States. Reported below: 174 F. 2d 469.

No. 94, Misc. WETHERBEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 175 F. 2d 834.

No. 140, Misc. ADAMS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Sam W. Davis* for petitioner. *Price Daniel,* Attorney General of Texas, *Joe R. Greenhill,* First Assistant Attorney General, and *Jesse P. Luton, Jr.,* Assistant Attorney General, for respondent. Reported below: 153 Tex. Cr. R. —, 221 S. W. 2d 265.

No. 183, Misc. GIBSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Fred N. Howser,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent.

No. 196, Misc. REANIER *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 204, Misc. MILLER *v.* THE SULTANA. C. A. 2d Cir. Certiorari denied. *Thomas C. Burke* for petitioner. *Sparkman D. Foster* and *Laurence E. Coffey* for respondent. Reported below: 176 F. 2d 203.

No. 227, Misc. CAVINESS *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 228, Misc. SHOTKIN *v.* PERKINS ET AL. Supreme Court of Colorado. Certiorari denied. Reported below: See 118 Colo. 584, 199 P. 2d 295.

No. 230, Misc. WESTENHAVER *v.* ILLINOIS. Circuit Court of Shelby County, Illinois. Certiorari denied.

No. 238, Misc. JOHNSON *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 239, Misc. REEVES *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 240, Misc. SHOTKIN *v.* PERKINS. Supreme Court of Colorado. Certiorari denied. Reported below: See 118 Colo. 584, 199 P. 2d 295.

No. 245, Misc. PERROZZI *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 249, Misc. SHERLOCK *v.* RAGEN, WARDEN. Circuit Court of Stark County, Illinois. Certiorari denied.

No. 250, Misc. STINCHCOMB *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

JANUARY 9, 1950.*

Per Curiam Decision.

No. 69. SINCLAIR *v.* UNITED STATES. Certiorari, 337 U. S. 954, to the United States Court of Appeals for the Third Circuit. Argued November 9, 1949. Decided January 9, 1950. *Per Curiam:* The judgment is reversed. *United States* v. *Limehouse,* 285 U. S. 424; *Swearingen* v. *United States,* 161 U. S. 446. *Jacob Kossman* argued the cause for petitioner. With him on the brief was *David Berger. John R. Benney* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan. Emanuel Redfield* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal. Reported below: 174 F. 2d 933.

Miscellaneous Orders.

No. 254, Misc. SCHECTMAN *v.* FOSTER, WARDEN. The motion for leave to file petition for writ of certiorari is denied. Petitioner *pro se. Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *Herman N. Harcourt* and *George A. Radz,* Assistant Attorneys General, for respondent.

No. 257, Misc. YOUNG *v.* ROBINSON, WARDEN;
No. 273, Misc. BROWN *v.* MINNESOTA; and
No. 274, Misc. BRIDGE *v.* WRIGHT, WARDEN. The motions for leave to file petitions for writs of habeas corpus are severally denied.

No. 262, Misc. HYNES, REGIONAL DIRECTOR, *v.* PRATT, JUDGE. The motion for leave to file petition for writ of

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

mandamus is denied. *Ex parte Fahey*, 332 U. S. 258. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *S. Billingsley Hill* for petitioner.

Certiorari Granted.

No. 434. NATIONAL LABOR RELATIONS BOARD *v.* MEXIA TEXTILE MILLS, INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. *John M. Scott* for respondent. Reported below: 25 L. R. R. M. 2295.

No. 435. NATIONAL LABOR RELATIONS BOARD *v.* POOL MANUFACTURING CO. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. *John M. Scott* for respondent. Reported below: 24 L. R. R. M. 2147.

No. 445. BROWN SHOE CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari granted. *Charles M. McInnis* and *Ernest M. Callomon* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Carlton Fox* for respondent. Reported below: 175 F. 2d 305.

Certiorari Denied. (*See also No. 254, Misc., supra.*)

No. 376. GAYNOR *v.* METALS RESERVE CO. C. A. 8th Cir. Certiorari denied. *H. C. Harper* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* filed a brief for the United States opposing the petition. Reported below: 174 F. 2d 286.

No. 416. BURTON *v.* UNITED STATES;

No. 417. CAWTHORN *v.* UNITED STATES; and

No. 418. LABRANCHE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Homer Cummings, Edward H.*

Miller, Hugh M. Wilkinson and *Warren O. Coleman* for petitioner in No. 416. *Lloyd Paul Stryker* for petitioner in No. 417. *Bentley G. Byrnes* for petitioner in No. 418. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 175 F. 2d 960, 176 F. 2d 865.

No. 431. NATIONAL LABOR RELATIONS BOARD *v.* ATLANTA METALLIC CASKET CO. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. *M. E. Kilpatrick* for respondent. Reported below: 173 F. 2d 758.

No. 432. NATIONAL LABOR RELATIONS BOARD *v.* WILSON & CO., INC. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. *Richard C. Winkler* and *J. Blanc Monroe* for respondent. Reported below: 173 F. 2d 979.

No. 433. NATIONAL LABOR RELATIONS BOARD *v.* MASSEY GIN & MACHINE WORKS, INC. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. *A. O. B. Sparks* for respondent. Reported below: 173 F. 2d 758.

No. 450. EISENBERG *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 451. SCHAEFFER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Harry Shapiro* and *Hirsh W. Stalberg* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Joseph W. Bishop, Jr.* and *Lee A. Jackson* for respondent. Reported below: 174 F. 2d 827.

No. 452. McCarthy *v.* American Eastern Corp. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman, Charles Lakatos* and *Wilfred R. Lorry* for petitioner. *Thomas E. Byrne, Jr.* and *Timothy J. Mahoney, Jr.* for respondent. Reported below: 175 F. 2d 727.

No. 457. Colgrove et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Thurman Arnold* and *Walter M. Gleason* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl, Vincent A. Kleinfeld* and *John T. Grigsby* for the United States. Reported below: 176 F. 2d 614.

No. 458. Colusa Remedy Co. *v.* United States. C. A. 8th Cir. Certiorari denied. *Walter M. Gleason* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, John R. Benney, Robert S. Erdahl, Vincent A. Kleinfeld* and *Bernard D. Levinson* for the United States. Reported below: 176 F. 2d 554.

No. 459. Riley *v.* Union Pacific Railroad Co. C. A. 7th Cir. Certiorari denied. *William H. DeParcq* for petitioner. Reported below: 177 F. 2d 673.

No. 461. Apex Smelting Co. *v.* Burns et al., doing business as William J. Burns International Detective Agency. C. A. 7th Cir. Certiorari denied. *Joseph T. Lavorci* for petitioner. *David A. Canel* for respondents. Reported below: 175 F. 2d 978.

No. 462. Simpson Bros., Inc. *v.* District of Columbia. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John F. Hillyard* for petitioner. *Vernon E. West, Chester H. Gray* and

Edward A. Beard for respondent. Reported below: 85 U. S. App. D. C. 275, 179 F. 2d 430.

No. 300. MARYLAND *v.* BALTIMORE RADIO SHOW, INC. ET AL. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE FRANKFURTER has filed an opinion respecting the denial of the petition for writ of certiorari. *Hall Hammond,* Attorney General of Maryland, and *Harrison L. Winter,* Assistant Attorney General, for petitioner. *J. Purdon Wright* and *W. Frank Every* for respondents. *Elisha Hanson, William K. Van Allen* and *Arthur B. Hanson* filed a brief for the American Newspaper Publishers Association, as *amicus curiae,* opposing the petition. Reported below: 67 A. 2d 497.

Opinion of MR. JUSTICE FRANKFURTER respecting the denial of the petition for writ of certiorari.

The Criminal Court of Baltimore City found the respondents guilty of contempt and imposed fines for broadcasting over local radio stations matter relating to one Eugene H. James at a time when he was in custody on a charge of murder. The facts upon which these findings were based are best narrated in the authoritative statement of the trial court:

> "A little girl in one of the parks of Washington, D. C., had been murdered under horrible and tragic circumstances. Some ten days later, little Marsha Brill was dragged from her bicycle on one of the public thoroughfares of Baltimore City while in the company, or at least, in the vicinity of two of her playmates, and there stabbed to death. The impact of those two similar crimes upon the public mind was terrific. The people throughout the City were outraged. Not only were they outraged but they were terrified. Certainly, any parent of a young child

must have felt a dread at the thought that his or her child might be killed while out upon the thoroughfares of Baltimore City. We think we are justified in drawing the conclusion that there was widespread and compelling public interest in the Brill murder. We think we are justified in assuming that many, many ears were on that evening in Baltimore, glued to their radios. And what happened? Mr. Connelly goes on the air and announces 'Stand by for a sensation.' Now, gentlemen, it is a fair and safe bet that whatever the Hooper-rating of his station may be, no listener tuned to his station was going to turn his radio off when he heard that announcement. Mr. Connelly then proceeded to explain that James had been apprehended and that he had been charged with the Brill murder. That was all right. Nobody could quarrel with that, but then he goes on to say that James had confessed to this dastardly crime, that he has a long criminal record, that he went out to the scene with the officers and there re-enacted the crime, and further, dug up from somewhere down in the leaves the knife that he had used to murder the little girl. Now, gentlemen, the Court has no difficulty in concluding that the broadcast was devastating. Anybody who heard it would never forget it. The question then before us is: Did that broadcast and others which were less damaging by the other stations, have a clear and present effect upon the administration of justice? The Court is bound to say that we do not believe that those broadcasts had any appreciable effect to say nothing of constituting a clear and present danger, upon the decision of the Judges who tried the case. At the moment we do not recall just who those Judges were, but Judges are supposed to be made of sterner stuff than to be influenced by irresponsible statements regarding pend-

ing cases. They are trained to put aside inadmissible evidence and while we, of course, recognize our limitations, I think that most Judges, at least, are fairly able to disregard improper influences which may have reached their attention.

"Now, what about the jury? In the first place, what is this jury that we are talking about? They are twelve men, or in most jurisdictions now, as in Maryland, men and women who are picked from all walks of life and who have the responsibility of hearing cases and determining, in this State at least, not only the facts but the law in the case. It may be unfortunate, perhaps, but certainly the fact is that the jury's verdict is final in most cases. There is the limited protection of the accused to apply for a new trial, but the Court of Appeals can not determine—review and determine—the propriety of the verdict reached by the jury either on the law or on the facts. Now this jury system is intended, and I think it works out that way, to bring to the trial of a case as one element, the public opinion in the community. It is true that the jury is sworn to decide the case upon the evidence which it hears from the witness stand, but I think that no experienced lawyer would contend that a jury is not expected to bring to the consideration of its verdict the temperament of the community in which the members of the jury live. The jury is called upon to decide the facts as it hears them from the witness stand in the light of its past experience and, if you please, its past knowledge. True, attempts are made to get jurors who have not been touched with any previous influence in the case, but the safeguards that are provided for the realization of that ideal are all too limited.

"The Court knows no graver responsibility that devolves upon Counsel for the Defense in a serious

criminal case than the responsibility of advising his client whether to elect a jury trial or a court trial. Counsel must be able to sense public opinion, and he must evaluate the possible effect upon the jurors' minds of those things which they know or think they know. Doubtless, all of us have seen cases tried in which we felt that the Counsel made errors of judgment as to how the particular cases ought to be tried. They are, however, doing the best that they can and, as I have indicated, theirs is a grave responsibility, because it is irrevocable. When a jury determines a case that terminates the case and if Counsel may have made an unfortunate choice then his client suffers the consequences.

"Now, the Court can not help but feel that the broadcast referred to in these cases must have had an indelible effect upon the public mind and that that effect was one that was bound to follow the members of the panel into the jury room. The Court hardly needs evidence in this factual situation to reach the conclusion that James' free choice to either a court trial on the one hand and a jury trial on the other, has been clearly and definitely interfered with. However, we do have the testimony of his Counsel, Mr. Murphy, (and we are bound to say that his testimony seemed to be reasonable and persuasive) who told the Court that he felt that he had no choice. He simply could not afford to subject his client to the risk of trying his case before a jury in a community where this extraneous and improper matter had been broadcast. He did, in fact, elect a court trial, but he did not have any alternative, according to his Counsel, and the Court is bound to say that we agree with his Counsel. The suggestion has been made here that the right to a jury trial could have been protected by the right of removal and in this case

he did have the right, the Constitutional right, of removal. We assume that the Court would have sent the case to some other Circuit for trial but Mr. Murphy says that there were some Counties in the State where he did not want to send his client for a jury trial. Not only that, but many parts of the State were blanketed by the same broadcast information that was available to the people of the City of Baltimore. Counsel said that at least one of the stations had a radius of seven hundred and fifty miles.

"The suggestion was made here also, that the mischief could have been avoided by exercising the right of the Defense to examine, on their voir dire, all prospective jurors and then inquiring as to whether or not they had heard these broadcasts. Well, now, it hardly seems necessary for the Court to say to men who are experienced in the trial of jury cases, that every time Defense Counsel asked a prospective juror whether he had heard a radio broadcast to the effect that his client has confessed to this crime or that he has been guilty of similar crimes, he would by that act be driving just one more nail into James' coffin. We think, therefore, that remedy was useless.

"Now, gentlemen, the Court must conclude that these broadcasts did constitute, not merely a clear and present danger to the administration of justice, but an actual obstruction of the administration of justice, in that they deprived the Defendant, James, of his Constitutional right to have an impartial jury trial."

The Court of Appeals of Maryland reversed these convictions. 67 A. 2d 497. It did so by sustaining "the chief contention of the appellants, that the power to punish for contempt is limited by the First and Fourteenth Amendments to the Federal Constitution, and that the facts in the case at bar cannot support the judgments,

in the light of those amendments, as authoritatively construed by the Supreme Court." 67 A. 2d at 507. The decision of the Court of Appeals was thus summarized in the dissenting opinion of Judge Markell:

> "This court holds that under the decisions of the Supreme Court (*Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331, and *Craig* v. *Harney,* 331 U. S. 367) the judgments below violate the freedom of speech and of the press under the Fourteenth Amendment. If this is the correct interpretation of these decisions, of course they are conclusive." 67 A. 2d at 518.

Thereupon the State of Maryland asked this Court to issue a writ of certiorari to review the decision of its Court of Appeals. In its petition Maryland urges that while the Court of Appeals was of course bound by the decisions of this Court, that court misconceived our rulings, that the interpretation which it placed upon the *Bridges, Pennekamp* and *Craig* cases was not correct, with the result that it erroneously reversed the judgments for contempt. Since the court below reached its conclusions on a misconception of federal law, so the State of Maryland argues, only this Court can release the Maryland court from its bondage of error.

This Court now declines to review the decision of the Maryland Court of Appeals. The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter "of sound judicial discretion." Rule 38, paragraph 5. A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons

may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Since there are these conflicting and, to the uninformed, even confusing reasons for denying petitions for certiorari, it has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude. In order that the Court may be enabled to discharge its indispensable duties, Congress has placed the control of the Court's business, in effect, within the Court's discretion. During the last three terms the Court disposed of 260, 217, 224 cases, respectively, on their merits. For the same three terms the Court denied, respectively, 1,260, 1,105, 1,189 petitions calling for discretionary review. If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable. It becomes relevant here to note that failure to record a dissent from a denial of a petition for writ of certiorari in nowise implies that only the member of the Court who notes his dissent thought the petition should be granted.

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland. The issues canvassed in the opinions of that court, and which the State of Maryland has asked us to review, are of a nature which very readily lend themselves to misconstruction of the denial of this petition. The present instance is peculiarly one where the redundant becomes the necessary.

It becomes necessary to say that denial of this petition carries no support whatever for concluding that either the majority or the dissent in the court below correctly interpreted the scope of our decisions in *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331; and *Craig* v. *Harney,* 331 U. S. 367. It does not carry any implication that either, or neither, opinion below correctly applied those decisions to the facts in the case at bar.

The issues considered by the Court of Appeals bear on some of the basic problems of a democratic society. Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the Court for adjudication. It has taken centuries of struggle to evolve our system for bringing the

guilty to book, protecting the innocent, and maintaining the interests of society consonant with our democratic professions. One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. It would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge ". . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams* v. *United States*, 250 U. S. 616, 630. Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge.

I have set forth in an appendix the course of recent English decisions dealing with situations in which publications were claimed to have injuriously affected the prosecutions for crime awaiting jury determination. (As to freedom of press in England, see Report of the Royal Commission on the Press, Cmd. No. 7700, and the debate thereon in the House of Commons, July 28, 1949. 467 H. C. Deb. (5th ser.) 2683–2794.) Reference is made to this body of experience merely for the purpose of indicating the kind of questions that would have to be faced were we called upon to pass on the limits that the Fourteenth Amendment places upon the power of States to safeguard the fair administration of criminal justice by jury trial from mutilation or distortion by extraneous influences. These are issues that this Court has not yet adjudicated. It is not to be supposed that by implication it means to adjudicate them by refusing to adjudicate.

APPENDIX TO OPINION OF FRANKFURTER, J.

English decisions concerning contempt of court for comments prejudicial to the fair administration of criminal justice.

A. CASES FINDING CONTEMPT.

1. *King* v. *Tibbits and Windust*, [1902] K. B. 77 (1901). The judgment of the court (Lord Alverstone C. J., and Wills, Grantham, Kennedy and Ridley JJ.) was read by Lord Alverstone C. J. The case is adequately summarized in the headnote:

> "During the course of the trial of two persons for felony the reporter for a certain newspaper sent to the editor articles affecting the conduct and character of the persons under trial which would have been inadmissible in evidence against them. The editor published the articles, and, after the conviction and sentence of the two persons, he and the reporter were convicted on an indictment charging them with unlawfully attempting to pervert the course of justice by publishing the articles in question and with conspiring to do so:—
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> "*Held*, that the conviction must be affirmed."

Each of the defendants was sentenced to six weeks' imprisonment on each count of the indictment, the sentences to run concurrently.

2. *King* v. *Parke*, [1903] 2 K. B. 432 (Lord Alverstone C. J., Wills and Channell JJ.). Rule for contempt of court for publication of statements by a newspaper, before the accused's commitment for trial, that he had engaged in immoral conduct and had admitted a prior conviction and imprisonmment for forgery. Answering the argument that publication before commitment was not a contempt, the court through Wills J. said:

> "A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the

> Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned [pp. 436–37]."

The rule was made absolute, and a fine of £50 imposed.

3. *King* v. *Davies*, [1906] 1 K. B. 32 (1905) (Lord Alverstone C. J., Wills and Darling JJ.). Rule for contempt of court for publication in a newspaper of statements that a woman, then under arrest on a charge of abandoning a child but not committed for trial for attempted murder of the child until after the publication, had practiced wholesale baby farming and had been convicted of fraud. In delivering the judgment of the court, Wills J. relied on *King* v. *Parke*, *supra:*

> "We adhere to the view we expressed in that case that the publication of such articles is a contempt of the Court which ultimately tries the case after committal, although at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is to poison the stream of justice in that Court, though at the time of their publication the stream had not reached it . . . [p. 35]."

The rule was made absolute, and a fine of £100 imposed.

4. *Rex* v. *Clarke*, 27 T. L. R. 32 (K. B. 1910) (Darling, Pickford and Coleridge JJ.). Rule *nisi* for contempt of court based on a statement published in a newspaper that one Crippen had confessed to having killed his wife, but had denied the act was murder. Crippen was at the time in custody though not yet formally charged.

During the course of the argument, Darling J. stated:

> "Even if a confession had really been made, it might still have been contempt to publish it; it might have been of such a kind as to be inadmissible in evidence [p. 33]."

The pertinent part of the judgment of the court, delivered through Darling J., was thus reported:

> "In the present case, after the man was in custody the newspaper commented upon the case as to whether he had committed the crime, not to assist in unravelling the case. It was merely an attempt to minister to the idle curiosity of people as to what was passing within the prison before the trial took place. A news agent procured various telegrams from Quebec, and, when he did not get enough, he telegraphed for 1,000 words more.

The *Daily Chronicle* published a telegram from Quebec stating:—'It is generally considered here that the formal official denials that Crippen has made a confession hinge upon a distinction between the words "admission" and "confession."' Whether it was an admission or confession the effect on the prisoner would be the same. The telegram went on:—'It is quite possible that what Crippen said may not be regarded officially as a confession, especially as he declared that he was not a "murderer," but that the prisoner made a statement to Inspector Dew last Monday I have reason to feel certain. I have confidence in the authority on which I cabled you the information sent last night, and I am assured to-day from the same source that Crippen admitted in the presence of witnesses that he had killed his wife, but denied that the act was murder,' and finishing up with stating that his wife died from an operation. Anything more calculated to prejudice a defence could not be imagined. The jurors were drawn from the county of Middlesex, where this paper was widely circulated.

"The Court had come to the conclusion that a contempt of the Court had been committed in the publication of this matter, and that it was a very grave contempt. It was most important that the administration of justice in the country should not be hampered. To hold otherwise would be to narrow the jurisdiction of the Court, and his Lordship added that, so long as they sat there, they were determined that trial by newspaper should not be substituted for trial by jury. The primary punishment in a case of this kind was imprisonment. The Court could not be blind to the fact that newspapers were frequently owned by wealthy people who would take their chance and cheerfully pay any fines that might be inflicted for the sake of the advertisement. If this practice was not stopped the Court would have to inflict the primary punishment. But the Court did not intend to do so in the present case. Mr. Perris had seen that he was in the wrong and had apologized. The apology was due to the people wronged and to the public. The Court had no feeling in regard to the matter. The Court therefore did not punish him as if he persisted in his wrongdoing. But, notwithstanding this, a very grave offence had been committed. His Lordship expressed the hope that what he had said and what would be said would be the means of putting a stop to this kind of thing. The order of the Court was that Mr. Perris

should pay to the Court £200 and the costs, and that he should be imprisoned until the sum was paid [pp. 34–35]."

5. *Rex* v. *Astor*, 30 T. L. R. 10 (K. B. 1913) (Ridley, Scrutton and Bailhache JJ.). Rules *nisi* for contempt of court for comments in the *Pall Mall Gazette* and the *Globe* about a trial for criminal libel and a private shareholders' suit, both relating to the same person and to the same transaction. The proceedings are reported in part as follows:

"Counsel continuing said that if the rule was made absolute it would amount to an embargo on the Press, when a trial was pending, from publishing any item of news which could in any way be thought to prejudice the trial. It would be a very poor compliment to the jury to suppose that they would be influenced by the paragraph.

. . . . . .

"Mr. Justice Scrutton [referring to the *Gazette*] said that if a paper took upon itself to mix up together the reports of criminal proceedings and of civil proceedings relating to the same share transaction, he could come to no other conclusion than that it might tend to prejudice the jury trying the case, who were not trained lawyers able to distinguish the exact relevance of a charge of that kind. But he agreed that, having made ample apologies, the respondents need only pay the costs [p. 12]."

With respect to the comments in the *Globe* the rule was discharged without costs, since the comments on the criminal and civil proceedings were printed in separate portions of the paper.

6. *Rex* v. *J. G. Hammond & Co.*, 30 T. L. R. 491 (K. B. 1914) (Darling, Avory and Rowlatt JJ.). Rule *nisi* for contempt of court for the publication of comments on a prosecution for perjury then in progress before the magistrate:

"Dealing with the main question in the case, he (Mr. Justice Darling) said he could not entertain the slightest doubt that the comments made in *Modern Society* were a contempt of Court. It seemed to him that they were absolutely intended to damage the prosecutor, Sir J. B. Robinson, and to glorify and extol Mr. Louis Cohen. That being so they were clearly calculated to prejudice the conduct of the trial, and were therefore a contempt of Court. He could not accept as sincere the expressions of regret made by the two companies and by Mr. Harris in the affidavits read to them. The judgment of the Court would be

that Mr. Harris must pay a fine of £50 and the costs of the proceedings. Harris was out of the jurisdiction at present and it was necessary that the order of the Court should be in a particular form. The rule would be made absolute against him, but the writ of attachment would be superseded if he paid the fine of £50. With regard to the two limited companies, in their judgment there was nothing to be said in mitigation of the offence which they had committed, and the order with regard to each would be that they must pay a fine of £50 and the costs of the proceedings, the fine to be levied upon the goods of the respective companies [p. 492]."

7. *Rex* v. *Editor and Printers and Publishers of the Evening Standard,* 40 T. L. R. 833 (K. B. 1924) (Lord Hewart C. J., Roche and Branson JJ.). Rules *nisi* for contempt of court based upon statements printed in three newspapers, the *Evening Standard, Manchester Guardian* and *Daily Express.* The *Standard* had hired amateur detectives to investigate a killing and published what was uncovered at a time when a charge of murder had been made and a trial was to take place. The judgment of the court was delivered through the Lord Chief Justice and reported in part as follows:

"It was urged on behalf of one respondent on the previous day that it was part of the duty of a newspaper when a criminal case was pending to elucidate the facts. If he understood that suggestion when clearly expressed it came to something like this; that while the police or the Criminal Investigation Department were to pursue their investigations in silence and with all reticence and reserve, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the prosecution or the point of view of the defence, it had come to be somehow for some reason the duty of newspapers to employ an independent staff of amateur detectives, who would bring to an ignorance of the law of evidence a complete disregard of the interests whether of the prosecution or the defence. They were to conduct their investigation unfettered, to publish to the whole world from time to time the results of these investigations, whether they conceived them to be successful or unsuccessful results, and by so doing to perform what was represented as a duty, and, one could not help thinking, to cater for the public appetite for sensational matter.

"It was not possible for that Court, nor had it any inclination, to suggest to the responsible editors of those newspapers what

were the lines on which they ought to proceed. Any such task as that was entirely beyond the province of that or any other tribunal. Those who had to judge by the results could see what a perilous enterprise this kind of publication was. It was not possible even for the most ingenious mind to anticipate with certainty what were to be the real issues, to say nothing of the more difficult question what was to be the relative importance of different issues in a trial which was about to take place. It might be that a date, a place, or a letter, or some other one thing which, considered in itself, looked trivial, might prove in the end to be a matter of paramount importance. It was impossible to foresee what was important [p. 835].

. . . . .

"His Lordship added that in all the cases the fines would be increased by the payment of costs. He said that nobody who knew anything of the organization and management of a newspaper office could be ignorant of the fact that the work of newspapers was very often done in circumstances of great hurry by many different minds not always fully aware of what others might be doing. The result was a composite thing, but there must be central responsibility. It was impossible to say that men occupying responsible positions should be excused because they themselves were not personally aware of what was being done. The practice was really becoming prevalent, and it was quite obvious that there were those who thought that publications of this kind were not only legitimate, but even commendable. In the hope that that day's proceedings would show that in the opinion of that Court that view was entirely wrong, the Court had merely imposed a fine, but if the practice were repeated the Court would not again be disposed to adopt that merciful alternative [p. 836]."

The rules were made absolute, and fines imposed of £1,000 for the acts of the *Evening Standard* and £300 each for the statements in the *Manchester Guardian* and *Daily Express*.

8. *Rex* v. *Editor, Printers and Publishers of the Daily Herald*, 75 Sol. J. 119 (K. B. 1931) (Lord Hewart C. J., Avory and MacKinnon JJ.). Rule *nisi* for contempt for publishing a poster, which in fact related to another case, containing the words "Another Blazing Car Murder" at a time when an accused stood committed for trial on

the charge of murder of a man in a motor car found burned up. As is the practice in all these cases the respondents tendered full apology to the court. In delivering the judgment, Lord Hewart C. J. stated that the poster words might suggest that the accused had committed murder which was the issue the jury had to decide. The rule was made absolute, but only costs were assessed.

9. *Rex* v. *Editor, Printer and Publisher of the Surrey Comet,* 75 Sol. J. 311 (K. B. 1931) (Lord Hewart C. J., Avory and Humphreys JJ.). Rule *nisi* for contempt of court. The judgment of the court is summarized as follows:

> "Lord HEWART, C. J., said that the point was whether something had been published which might prejudice the trial of an accused man. In the article complained of there was a long account, carefully got together, which included at least three statements of grave prejudice against the man who afterwards was charged. A newspaper was entitled to report, fairly and accurately, what took place in open court, but, in the present case, *ex concessio,* nothing had taken place in court, and there was no question of reporting proceedings in court. The newspaper had busied itself in the deplorable enterprise of collecting materials which might be thought to be of interest concerning that which had been done and the person who, it was expected, would be accused. Once a newspaper departed from a fair and accurate report of what was actually stated in open court it not only took a great risk itself, but it also imperilled the unfortunate man, guilty or innocent, who was charged. For what had been done in the present case there was no conceivable excuse. His lordship added that if that kind of cynical indifference for the interests of accused persons continued to be displayed, cases would not be met by the imposition of fines. He hoped that the case would have the effect of attracting the attention of professional journalists to the utter impropriety of an enterprise of that character. The rule would be made absolute against the editor of the newspaper, the costs paid as between solicitor and client, and the editor would be fined £500 [pp. 311–12]."

10. *Rex* v. *Hutchison,* [1936] 2 All Eng. 1514 (K. B.) (Swift, Humphreys and Goddard JJ.). Rules *nisi* for contempt of court for showing a news film of the arrest of a man, subsequently charged with unlawful possession of firearms, with the caption: "Attempt on the

King's life." The arrest had been made after a revolver fell close to the King's horse during a procession in which the King was riding, and it was widely feared that an attempt had been made on the King's life. Swift J. delivered the judgment of the court making the rules absolute on the ground that the caption was likely to bring about "derangement in the carriage of justice" (p. 1515). Because of their apologies only costs were assessed against some respondents, but another was fined £50 and costs "to mark the court's disapproval of their conduct" (p. 1515).

11. *Rex* v. *Editor, Printers and Publishers of the Evening News,* The Times (London), July 30, 1936, p. 4, col. 3 (K. B.) (Swift, Humphreys and Goddard JJ.). Rule *nisi* for contempt of court for publishing articles describing as a "crank" and a person regarded by the police as a "harmless lunatic nursing a grievance" someone under arrest for unlawful possession of firearms. He was the same accused about whom the news film in *Rex* v. *Hutchison, supra,* was shown. The court's decision is summarized as follows:

> "Mr. Justice Swift, in giving judgment, said that proceedings for contempt of Court were not taken to vindicate the dignity of the Court or the person of a Judge, but to prevent undue interference with the administration of justice. It was essential that when a criminal charge was made against any one there should be no tampering of any sort or kind with those who would ultimately have to decide the matter.
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> "It was not disputed that the article complained of was a gross contempt of Court in the sense that it was bound to influence the minds of those who read it against the man who was accused of a crime before he could be brought to trial.
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> "The Court thought that it was an extremely serious matter; but it took into account the unqualified, unreserved, and sincere apology which had been made for what had been done. The Court also recognized that there might have been circumstances which alleviated part, but only part, of what had been published. No regard seemed to have been paid by the newspaper to the position of the accused man at all. His state of mind, his conduct in the past, the names under which he had gone, whether the statements made were true or untrue, were all put before the public and those members of the public who would ultimately form the tribunal to try him.
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> "The judgment of the Court would be that the rule should be made absolute and that the editor and the printers and

publishers of the newspaper should each be fined £500, and be ordered to pay the costs of the application."

12. *King* v. *Daily Mirror,* [1927] 1 K. B. 845. Rules *nisi* for contempt of court for publishing in a newspaper the photograph of a person charged with a criminal offense. The bearing of such publication on the fairness of a later trial is sufficiently indicated in the judgment of Lord Hewart C. J., with whom Avory and Talbot JJ. concurred:

"The phrase 'contempt of court,' as has been observed more than once, is, in relation to the kind of subject-matter with which we are now concerned, a little misleading. The mischief referred to consists, not in some attitude towards the Court itself, but in conduct tending to prejudice the position of an accused person. In other words, what is really in question is nothing attacking the status of the Court as a court, but something which may profoundly affect the rights of citizens [p. 847].

. . . . .

"Nobody would excuse a police officer in the conduct of a case if, collecting together all the various persons among whom identifying witnesses might be found, he said: 'I have arrested a man, and I am going to put him up for identification by you,' and then showed to those persons a photograph of the suspected person. The unfairness of that course is manifest, because the witness approaches the difficult and it may be the crucial task of identification with his mind prejudiced by the knowledge that this particular person has been arrested and is in the hands of the police. What does a newspaper do when it prints a photograph in these circumstances? It invites the whole country to scrutinize the features of the accused who has been arrested. That it does that act not in the course of preparation of the case for the prosecution but merely in the course of the conduct of a money-making business does not excuse in a newspaper that which would be reprehensible in a police officer. In my opinion, in the publication of a photograph no less than in narrative, it is the duty of a newspaper to take care to avoid publishing that which is calculated to prejudice a fair trial. To approach the matter in a mood of cynical indifference is obviously wrong. There is a duty to take care lest, by the publication of matter, whether in the form of a photograph or of printed words, prejudice should be caused to a person about

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to stand his trial. That of course does not mean, nor am I for a moment suggesting, that a newspaper is not entitled in any circumstances to publish a photograph of a person who is a party to either civil or criminal proceedings. But I am no less clear upon the point that there is a duty to refrain from the publication of the photograph of an accused person where it is apparent to a reasonable man that a question of identity may arise. If in these circumstances a newspaper prints a photograph it is taking a grave risk, which in one sense affects the accused person, and in another sense affects the newspaper [pp. 849–50]."

The rules were made absolute, but, since this was the first occasion upon which the question arose with respect to the publication of a photograph of an accused person, only costs were assessed.

13. The Times (London), Mar. 26, 1949, p. 3, col. 1, reported the recent case arising out of the prosecution of Haigh, the so-called Bluebeard, as follows:

"A Divisional Court of the King's Bench—the Lord Chief Justice [Goddard], Mr. Justice Humphreys, and Mr. Justice Birkett—yesterday, on the two motions for writs of attachment for contempt of Court made on behalf of John George Haigh (who is at present in custody on a charge of murdering Mrs. Olive Durand-Deacon) against Mr. Silvester Bolam, the editor of the *Daily Mirror,* and Daily Mirror Newspapers, Limited, the Court ordered that Mr. Bolam should be committed to prison for three calendar months, and that the company should pay a fine of £10,000 and the costs of the proceedings.

. . . . .

"The Lord Chief Justice, delivering the judgment of the Court, said that Sir Walter Monckton had moved for a writ of attachment against Mr. Silvester Bolam, the editor of the *Daily Mirror,* for contempt of Court. In view of the gravity of the case the Court directed that the proprietors of the newspaper, a limited company, Daily Mirror Newspapers, Limited, should also be summoned before the Court to answer for the contempt committed by the publication in the newspaper of the matters complained of. It appeared that a man named Haigh had been arrested and charged with murder. He had been brought before the examining justices at Horsham and the case had not yet been opened. No more was known than that he had been charged with murder.

"On March 4 three issues of the *Daily Mirror* were published—three separate editions. Those editions contained articles, photographs, and headlines in the largest possible type, of a character which the Court could only describe as a disgrace to English journalism as violating every principle of justice and fair play which it had been the pride of this country to extend to the worst of criminals.

" 'To use the language of Lord Hardwicke in 1742, in the case of the *St. James's Evening Post*—it is a case of prejudicing mankind against persons before their case is heard.'

"Any one who had had the misfortune, as the members of the Court had, to read the articles must be left wondering how it could be possible for this man to obtain a fair trial after what had been published. Not only did the articles describe him as a vampire and give reasons for that description of him, but, after saying that he had been charged with one murder, they went on to say not merely that he was charged with other murders but that he had committed others and gave the names of persons whom, they said, he had murdered. A photograph was given of a person whom he was said to have murdered, with a description of the way in which the crime was committed.

"In the long history of the present class of case there had never, in the opinion of the Court, been one of such gravity as this, or one of such a scandalous and wicked character. It was of the utmost importance that the Court should vindicate the common principles of justice and, in the public interest, see that condign punishment was meted out to persons guilty of such conduct. In the opinion of the Court what had been done was not the result of an error of judgment but was done as a matter of policy in pandering to sensationalism for the purpose of increasing the circulation of the newspaper.

"After it had come to the knowledge of the Commissioner of Police that the *Daily Mirror* or some other paper might be likely to publish some details of the case, in the course of the evening a warning was sent from the office of the Commissioner of Police to this newspaper. That that had any real effect on this newspaper, in spite of what had been said in the affidavit, it was difficult to believe. It was true that there was some, but very little, alteration in the last edition. That edition was itself a gross contempt, not perhaps quite so bad as the other two which had been issued. The fact that the police had given a warning did not affect the question one way or the other. It

was an offence whether notice had been given or not. It might aggravate the case that more attention was not paid to the warning.

"As he had said, in view of the gravity of the case the Court had ordered the proprietors of the newspaper to be brought before the Court. He would add a word of warning: let the directors beware; they knew now the conduct of which their employees were capable, and the view which the Court took of the matter. If for the purpose of increasing the circulation of their paper they should again venture to publish such matter as this, the directors themselves might find that the arm of that Court was long enough to reach them and to deal with them individually. The Court had taken the view that there must be severe punishment.

"His LORDSHIP then called on Mr. Bolam to stand up, and, addressing him, said: 'The writ of attachment will be issued, and you will be taken in the custody of the tipstaff and committed to Brixton Prison for three calendar months.'

"Continuing, his LORDSHIP said that the respondent company would be fined £10,000 and pay the costs of the proceedings."[1]

B. CASES FINDING NO CONTEMPT.

1. *Rex* v. *Editor and Publishers of The People,* The Times (London), April 7, 1925, p. 5, col. 4 (K. B.) (Lord Hewart C. J., Shearman and Salter JJ.). Rule for contempt for publication of articles accusing one Hobbs of diabolical roguery and calling him the "wizard crook of the underworld." The articles were published after Hobbs' conviction for conspiracy to defraud another, but it was alleged that they were calculated to prejudice the hearing of the appeal. The relevant part of the judgment is reported as follows:

"The LORD CHIEF JUSTICE, in his judgment, said that the argument had travelled over various matters which in his opinion did not arise upon this rule, the sole ground of which was that the articles were calculated to prejudice the fair hearing of the appeal.

. . . . .

"The Court, continued his Lordship, is not a school of taste; however deplorable, however disgusting these articles may be, or be thought to be, the question of censure to be passed on

[1] The decision is commented upon in 207 L. T. 181 (1949) and 207 L. T. 225 (1949).

them by men of taste or men of discretion does not arise. The only question is whether they are calculated to prejudice the fair hearing of the appeal. In my opinion, whatever may be the remedies of Hobbs otherwise, or the views of a *censor morum* or tasteful critic about these articles, they do not come within this branch of the law of contempt, and the rule will be discharged."

2. *Rex* v. *Editor of the Daily Mail,* 44 T. L. R. 303 (K. B. 1928) (Lord Hewart C. J., Avory and Branson JJ.). Rule *nisi* for contempt of court with respect to an article in the *Daily Mail* commenting on a suit for libel [2] by one Factor against the newspaper based on an earlier article published therein. The article as to which contempt was charged contained material which had frequently appeared in prior issues of the paper, but did not touch on the issue of fact in the libel proceeding. The judgment of the court discharging the rule was delivered by the Lord Chief Justice and reported in part as follows:

"The Court was not satisfied that the article of December 23—coming as it did, after a long series of similar articles, being but a repetition of charges already often made against Factor and not complained of, and avoiding, as it did, any further mention of the alleged association of Factor with Montgomery—was calculated to prejudice the trial of the only issues which Factor had chosen to raise—namely, that of his association with Montgomery and of the damages which he should obtain if that issue were found in his favour [p. 307]."

3. *Rex* v. *Editor, Printers, and Publishers of News of the World,* 48 T. L. R. 234 (K. B. 1932) (Lord Hewart C. J., Avory and Hawke JJ.). Rule *nisi* for contempt of court for publishing prior to the trial what purported to be a statement of the defense which would be made. The judgment of the court discharging the rule was delivered by the Lord Chief Justice and reported in part as follows:

"No doubt in some circumstances, and in some cases, the publication beforehand of what was said to be the defence of an accused person might amount to contempt of Court. They were dealing, however, not with general principles, but with the question whether those words came within the mischief against

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[2] This proceeding was civil, but it is included herein for completeness.

which contempt proceedings were directed. They now had it from counsel supporting the rule that last December something of the same sort had actually been said to the police by the accused man himself [pp. 234–35]."

4. *Rex* v. *Davies*, [1945] 1 K. B. 435 (Humphreys and Oliver JJ.). Application for an order for a writ of attachment for contempt of court, based on comments in a newspaper article about one convicted of procuring miscarriage, made after notice of appeal of the conviction had been filed. The motion was refused on the ground that the particular comments did not amount to a contempt of court, but both Humphreys and Oliver JJ. agreed that there might be contempt even though the trial had ended. Portions of their opinions follow:

"HUMPHREYS J. . . . Can the publication of any defamatory matter, or of any matter which would amount to a contempt of court if it had been published before the applicant in the present case had been tried by a jury, be said to be calculated to interfere with the due course of law and justice by prejudicing the fair hearing of the applicant's appeal? In considering this question one must remember what are the powers of the Court of Criminal Appeal. If that court existed for the sole purpose of deciding questions of law which come before it, the answer to the question I put above might well be in the negative. It might be said that it is inconceivable that any court considering a pure question of law could be affected by anything written in a newspaper about the character of one of the parties in a civil or criminal case. It is, indeed, inconceivable that if one of the judges of such a court had happened to have read the particular newspaper in question, it could have the smallest effect on him. Those observations, however, do not apply in the case of the Court of Criminal Appeal. That court has many functions to perform. One of the powers which it possesses, as was decided by the House of Lords in *Crane* v. *Director of Public Prosecutions* [(1921) 15 Cr. App. R. 183], is that when it finds that proceedings on an indictment are for any reason void, it may order a trial of the indictment in question. It, therefore, has the power which used to exist in the court for the consideration of Crown Cases Reserved, of awarding venire de novo. The effect of that is that in any case coming before it the Court of Criminal Appeal may direct that a jury shall

be sworn to try the issue on the indictment which has never properly been tried. It is, therefore, quite a fallacy to treat this case as if all that the Court of Criminal Appeal could do with regard to it would be to decide a question of law. It may be true in a sense that they are deciding a question of law, but the effect of their decision may be that a jury will have to try the question of fact. It follows that any matter which is published between the date of a conviction and the date of the hearing by the Court of Criminal Appeal may come to the attention of a juryman who has to try the question of the guilt or innocence of some person on the indictment in respect of which venire de novo has been awarded. . . . There is another matter regarding which I desire to say a few words. I think it is a fallacy to assume that the only object of imposing punishment for contempt of court in a criminal case is to prevent a juryman, who may be trying the person affected, from reading matter of which he ought to know nothing. There is also the judge to be considered, and, while I am not saying for a moment that any person sitting in a judicial capacity, who may, be it remembered, be a chairman of quarter sessions, who may or may not be a lawyer, or a recorder, or it may be, of course, one of the judges of the King's Bench Division, would be affected by anything he might read, I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him, would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty. . . . It is my own opinion and I express it as such, but I venture to think that no judge with long criminal experience will fail to be able to recall instances in which the publication of matters such as that to which I have referred has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will have that effect [pp. 441–43]."

"OLIVER J. . . . One of the evils of inadmissible matter being disseminated is that no one can tell what effect a particular piece of information may have on his mind. Why, as my Lord has asked, and I can think of no better word, should a judge

be 'embarrassed' by having matters put into his mind, the effect of which it is impossible to estimate or assess? As an illustration of this proposition, the Court of Criminal Appeal has expressed, not once but many times, its thorough disapproval of evidence which is sometimes given by police officers at the end of a case when a man has been convicted. On such occasions all sorts of allegations are frequently made against a man's character, sometimes in the nature of hearsay and sometimes not supported by evidence at all. What is the ground for the disapproval of the Court of Criminal Appeal regarding such statements? It can only be that the judge who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider. . . . Not all defamatory matter can amount to contempt of court. It is unnecessary to go through the authorities, but that appears in case after case. Whether defamatory matter amounts to contempt in any particular case is a question in each case of fact, of degree and of circumstances. Obviously far less would amount to contempt of court if the matter were published before the hearing by a jury than would be required before a hearing by a judge or by the Court of Criminal Appeal. . . . Much is said to-day about the freedom of the press, and I only wish to point out that our decision in this case comes to no more than this: that everything the public has a right to know about a trial of the kind with which we are here concerned, that is to say, everything that has taken place in open court, may be published, and beyond that there is no need or right to go [pp. 445–46]."

No. 465. NEWYAHR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William R. Lichtenberg* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 85 U. S. App. D. C. 384, 177 F. 2d 658.

No. 469. TURPIN *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *Henry K. Chapman* for petitioner. *Thomas E. Fairchild,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General,

and *William A. Platz,* Assistant Attorney General, for respondent. Reported below: 255 Wis. 358, 38 N. W. 2d 495.

No. 474. SMITH ET AL. *v.* O'DWYER, MAYOR, ET AL. Court of Appeals of New York. Certiorari denied. Reported below: 299 N. Y. 795, 87 N. E. 2d 687.

No. 493. GRANAT BROS. ET AL. *v.* GOMEZ ET AL., DOING BUSINESS AS GOMEZ MANUFACTURING CO. C. A. 9th Cir. Certiorari denied. *Oscar A. Mellin* for petitioners. *Chellis Carpenter* for respondents. Reported below: 177 F. 2d 266.

Nos. 393 and 398. PEDIGO ET AL. *v.* CELANESE CORPORATION;

No. 394. CARROLL ET AL. *v.* CELANESE CORPORATION;

Nos. 395 and 397. ALRED ET AL. *v.* CELANESE CORPORATION; and

Nos. 396 and 399. WOMACK *v.* CELANESE CORPORATION. Supreme Court of Georgia. Certiorari denied. MR. JUSTICE BLACK thinks petitioners were denied due process of law and that the petition should be granted. *Isadore Katz* and *Warren E. Hall, Jr.* for petitioners. *Barry Wright* for respondent. *Arthur J. Goldberg* and *Thomas E. Harris* filed a brief for the Congress of Industrial Organizations, as *amicus curiae,* supporting the petition. Reported below: No. 393, 205 Ga. 392, 54 S. E. 2d 252; No. 394, 205 Ga. 493, 54 S. E. 2d 221; No. 395, 205 Ga. 499, 54 S. E. 2d 225; No. 396, 205 Ga. 514, 54 S. E. 2d 235; Nos. 397–399, 205 Ga. 371, 54 S. E. 2d 240.

No. 68, Misc. GRESHAM *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Price Daniel,* Attorney General of Texas, *Joe R. Green-*

hill, First Assistant Attorney General, and *Frank Lake,* Assistant Attorney General, for respondent.

No. 159, Misc. ATHERTON ET AL. *v.* UNITED STATES; and

No. 160, Misc. EDWARDS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Solicitor General Pearlman, Assistant Attorney General Campbell, John R. Benney, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Briefs of *amici curiae* supporting the petition were filed by *Arthur J. Goldberg* for the Congress of Industrial Organizations, and *Robert R. Rissman* for Warmer et al. Reported below: 176 F. 2d 835.

No. 197, Misc. DICKEY *v.* UNITED STATES. Court of Claims. Certiorari denied. Reported below: 114 Ct. Cl. 439, 84 F. Supp. 741.

No. 251, Misc. PYEATTE *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 253, Misc. BLAND *v.* TEXAS. Forty-sixth Judicial District Court of Hardeman County, Texas. Certiorari denied.

No. 256, Misc. MCCANN *v.* NEW YORK STATE BOARD OF PAROLE. Petition for writ of certiorari to the New York State Board of Parole denied.

No. 258, Misc. HILT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 259, Misc. FARMER *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 260, Misc. PHILLIPS *v.* RAGEN, WARDEN. Circuit Court of Edgar County, Illinois. Certiorari denied.

No. 268, Misc. NICHOLAS *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

Rehearing Denied.

No. 1210, October Term, 1945. GINSBURG *v.* SACHS ET AL., 328 U. S. 859. Second petition for rehearing denied.

No. 53. KINGSLAND, COMMISSIONER OF PATENTS, *v.* DORSEY, *ante*, p. 318. Rehearing denied.

No. 245. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS *v.* CITY OF PORTERVILLE ET AL., *ante*, p. 805. Rehearing denied.

No. 315. AMERICAN EASTERN CORP. *v.* MCCARTHY, *ante*, p. 868. Rehearing denied.

No. 329. KLEIN *v.* UNITED STATES, *ante*, p. 870. Rehearing denied.

No. 330. BURKE *v.* UNITED STATES, *ante*, p. 870. Rehearing denied.

No. 334. UNITED STATES *v.* SHORELINE COOPERATIVE APARTMENTS, INC. ET AL., *ante*, p. 897. Rehearing denied.

No. 365. KOFOUROS ET AL. *v.* GIANNOUTSOS ET AL., *ante*, p. 894. Rehearing denied.

No. 388. KORTHINOS ET AL. *v.* NIARCHOS, *ante*, p. 894; and

No. 389. MALEURIS ET AL. *v.* PAPADAKIS, *ante*, p. 894. Rehearing denied.

No. 317. FLICK *v.* JOHNSON, SECRETARY OF DEFENSE, ET AL., *ante*, p. 879. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 368. ROSENBLUM *v.* UNITED STATES;
No. 369. STRYK *v.* UNITED STATES; and
No. 370. WEISS *v.* UNITED STATES, *ante*, p. 893. Rehearing denied. MR. JUSTICE MINTON took no part in the consideration or decision of this application.

No. 400. FIFTH & WALNUT, INC. ET AL. *v.* LOEW'S INC. ET AL., *ante*, p. 894. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 42, Misc. ROHDE *v.* ILLINOIS, *ante*, p. 833. Rehearing denied.

No. 81, Misc. EAGLE *v.* CHERNEY ET AL., *ante*, p. 837. Second petition for rehearing denied.

No. 215, Misc. CRUSE *v.* RAGEN, WARDEN, *ante*, p. 884. Rehearing denied.

JANUARY 16, 1950.*

Per Curiam Decisions.

No. 472. HORN ET AL. *v.* CHICAGO. Appeal from the Supreme Court of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Lloyd Lanham* for appellants. *Benjamin S. Adamowski, L. Louis Karton* and *Arthur Magid* for appellee. Reported below: 403 Ill. 549, 87 N. E. 2d 642.

No. 176, Misc. BURKE *v.* GEORGIA. On petition for writ of certiorari to the Supreme Court of Georgia. *Per Curiam:* This is a petition for certiorari to review a decision of the Supreme Court of Georgia affirming denial of a motion to set aside a conviction made on the ground that into the conviction entered perjured testimony knowingly used by the prosecution. 205 Ga. 502, 54 S. E. 2d 348. Assuming that this decision denies to petitioner any relief whatever in the state courts unless the requirements of § 110–706 of the Georgia Code are satisfied, the petition for writ of certiorari is herewith denied, without prejudice to petitioner to seek in the appropriate United States District Court in Georgia whatever relief, if any, may be required by *Mooney* v. *Holohan,* 294 U. S. 103. *Paul Crutchfield* for petitioner. Reported below: 205 Ga. 502, 54 S. E. 2d 348.

Miscellaneous Orders.

No. 287, Misc. AVELINO *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. The motion for leave to file petition for writ of habeas corpus is also denied.

No. 271, Misc. EASON *v.* MOORE, WARDEN. The motion for leave to file petition for writ of habeas corpus is denied.

No. 292, Misc. SIMONSON *v.* ROBINS, GOVERNOR OF IDAHO, ET AL.;

No. 293, Misc. LANTZ *v.* KENNEDY; and

No. 295, Misc. COPLON *v.* REEVES ET AL. The motions for leave to file petitions for writs of mandamus are severally denied. *Archibald Palmer* for petitioner in No. 295, Misc. Petitioners *pro se* in Nos. 292 and 293, Misc.

Certiorari Granted.

No. 455. AUTOMATIC RADIO MANUFACTURING CO., INC. *v.* HAZELTINE RESEARCH, INC. C. A. 1st Cir. Certiorari granted. *Floyd H. Crews* and *George K. Woodworth* for petitioner. *Miles D. Pillars, Philip F. LaFollette, Leonard A. Watson* and *Laurence B. Dodds* for respondent. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae,* supporting the petition. Reported below: 176 F. 2d 799.

Certiorari Denied. (*See also No. 472 and Misc. Nos. 176 and 287, supra.*)

No. 426. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 390, A. F. OF L., ET AL. *v.* WATSON, ATTORNEY GENERAL, ET AL. Supreme Court of Florida. Certiorari denied. *J. Albert Woll, Herbert S. Thatcher, James A. Glenn, John C. Gramling* and *Warren E. Hall, Jr.* for petitioners. Reported below: 41 So. 2d 341.

No. 466. STEVENS ET AL., DOING BUSINESS AS SLEET SHAVER MFG. CO., *v.* FEDERAL CARTRIDGE CORP., DOING BUSINESS AS TWIN CITIES ORDNANCE PLANT. Supreme Court of Minnesota. Certiorari denied. *John M. Palmer* for petitioners. *Solicitor General Perlman, Assistant*

Attorney General Morison and *Samuel D. Slade* for respondent. Reported below: 229 Minn. 597, 38 N. W. 2d 154.

No. 471. COURANT *v.* INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRY, LOCAL 659, ET AL. C. A. 9th Cir. Certiorari denied. *Henry B. Ely* for petitioner. *Henry G. Bodkin, George M. Breslin* and *Michael G. Luddy* for respondents. Reported below: 176 F. 2d 1000.

No. 477. COMBINED METALS REDUCTION CO. *v.* NEVADA HALF MOON MINING CO. C. A. 10th Cir. Certiorari denied. *Herbert Van Dam* for petitioner. *Parnell Black* for respondent. Reported below: 176 F. 2d 73.

No. 180, Misc. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Wayne M. Collins* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney* and *Ellis N. Slack* for the United States. Reported below: 176 F. 2d 773.

No. 223, Misc. CHAPMAN *v.* CALIFORNIA. District Court of Appeal, First Appellate District, of California. Certiorari denied. Reported below: 93 Cal. App. 2d 365, 209 P. 2d 121.

No. 224, Misc. DE LUCA *v.* ATLANTIC REFINING CO. C. A. 2d Cir. Certiorari denied. Reported below: 176 F. 2d 421.

No. 237, Misc. HARDGRAVE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 266, Misc. PUTNAM *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 269, Misc. SAXTON *v.* RAGEN, WARDEN. Supreme Court of Illinois, Circuit Court of Will County and Circuit Court of Kane County, Illinois. Certiorari denied.

No. 270, Misc. BERNOVICH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 403 Ill. 480, 87 N. E. 2d 609.

No. 272, Misc. SWAIN *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 277, Misc. BERMAN *v.* SWENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 177 F. 2d 717.

No. 280, Misc. PETERS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. *Wm. Scott Stewart* for petitioner. Reported below: 178 F. 2d 377.

No. 283, Misc. EDMONDSON *v.* WRIGHT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 177 F. 2d 719.

No. 286, Misc. DEWEESE *v.* RAGEN, WARDEN. Supreme Court of Illinois, Circuit Court of Will County and Circuit Court of Rock Island County, Illinois. Certiorari denied.

No. 288, Misc. TAYLOR *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 252, Misc. WILLIS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois; and

No. 281, Misc. SCOTT *v.* ROBINSON, WARDEN. Circuit Court of Marion County, Illinois. The petition for writ

of certiorari in each of these cases is denied without consideration of the questions raised therein and without prejudice to the institution by petitioner of proceedings in any Illinois state court of competent jurisdiction under the Act of August 4, 1949, entitled: "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted." Laws of Illinois, 1949, p. 722.

Rehearing Denied.

No. 12, Original. UNITED STATES *v.* LOUISIANA; and No. 13, Original. UNITED STATES *v.* TEXAS. The petition of Agnes E. and Annie C. Lewis for rehearing is denied. See *ante,* p. 902. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 56. O'DONNELL, ADMINISTRATRIX, *v.* ELGIN, JOLIET & EASTERN RAILWAY CO., *ante,* p. 384. Rehearing denied. MR. JUSTICE FRANKFURTER and MR. JUSTICE MINTON took no part in the consideration or decision of this application.

No. 430. UNITED STATES EX REL. MOBLEY *v.* HANDY, COMMANDING OFFICER, *ante,* p. 904. Rehearing denied.

No. 447. LAND O'LAKES DAIRY CO. *v.* COUNTY OF WADENA ET AL., *ante,* p. 897. Rehearing denied.

No. 205, Misc. DAYTON *v.* HUNTER, WARDEN, *ante,* p. 888. Rehearing denied.

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February 6, 1950.*

Per Curiam Decisions.

No. 497. Burton, doing business as A. B. Burton Co., *v.* United States et al. Appeal from the United States District Court for the Western District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *W. G. Burnette* for appellant. *Daniel W. Knowlton* for the Interstate Commerce Commission, appellee.

No. 502. Delaware, Lackawanna & Western Railroad Co. *v.* Division of Tax Appeals of New Jersey et al.; and

No. 503. Central Railroad Co. of New Jersey *v.* Division of Tax Appeals of New Jersey et al. Appeals from the Supreme Court of New Jersey. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed. *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653. *James D. Carpenter* for appellants. *Theodore D. Parsons,* Attorney General of New Jersey, and *Benjamin C. Van Tine* for the Division of Tax Appeals, appellee. Reported below: 3 N. J. 27, 68 A. 2d 749.

Miscellaneous Orders.

No. 247, Misc. McGuire *v.* United States. The motion for leave to file petition for writ of certiorari is denied.

No. 314, Misc. Becker *v.* Swygert, U. S. District Judge. The motion for leave to file petition for writ of mandamus is denied.

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*Mr. Justice Douglas took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

No. 539. Colonial Airlines, Inc. *v.* Adams et al. Appeal from the United States District Court for the District of Columbia. Dismissed on motion of counsel for appellant. *T. Peter Ansberry* and *Stephen J. McMahon, Jr.* for appellant. Reported below: 87 F. Supp. 242.

Certiorari Denied. (*See also No. 247, Misc., supra.*)

No. 460. Jiffy Lubricator Co., Inc. *v.* Stewart-Warner Corp. C. A. 4th Cir. Certiorari denied. *Leonard L. Kalish, Littleton M. Wickham* and *Guy B. Hazelgrove* for petitioner. *John D. Black, Elwood Hansmann* and *Thomas B. Gay* for respondent. Reported below: 177 F. 2d 360.

No. 463. Urbuteit *v.* United States. C. A. 5th Cir. Certiorari denied. *H. O. Pemberton* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl, Vincent A. Kleinfeld* and *William W. Goodrich* for the United States. Reported below: 176 F. 2d 438.

No. 468. Warren *v.* United States. C. A. 10th Cir. Certiorari denied. *John W. MacDonald* for petitioner. *Solicitor General Perlman, Stanley M. Silverberg, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 177 F. 2d 596.

No. 470. Sandroff et al. *v.* United States. C. A. 6th Cir. Certiorari denied. *Alvin L. Newmyer, David G. Bress* and *Sheldon E. Bernstein* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 174 F. 2d 1014.

No. 475. Capital Transit Co. *v.* Underwood. United States Court of Appeals for the District of Colum-

bia Circuit. Certiorari denied. *George D. Horning, Jr.* for petitioner. *Foster Wood* for respondent.

No. 476. Chicago Sugar Co. *v.* American Sugar Refining Co. C. A. 7th Cir. Certiorari denied. *Leslie M. O'Connor* for petitioner. *Kenneth F. Burgess* for respondent. Reported below: 176 F. 2d 1.

Nos. 478 and 479. Consumers Petroleum Co. *v.* Consumers Co. C. A. 7th Cir. Certiorari denied. *Albert E. Jenner, Jr.* and *Harry G. Hershenson* for petitioner. *Joseph B. Fleming* for respondent. Reported below: 176 F. 2d 441.

No. 480. Mulling, Municipal Court Judge, et al. *v.* Houlihan et al. Supreme Court of Georgia. Certiorari denied. Reported below: 205 Ga. 735, 55 S. E. 2d 150.

No. 481. Bejeuhr *v.* Shaughnessy, District Director, U. S. Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. *Herman L. Falk* for petitioner. *Solicitor General Perlman, Assistant Attorney.General Morison, Samuel D. Slade* and *Morton Hollander* for respondent. Reported below: 177 F. 2d 436.

No. 486. Robertson Rock Bit Co., Inc. et al. *v.* Hughes Tool Co. C. A. 5th Cir. Certiorari denied. *Floyd H. Crews* and *Robert P. Patterson* for petitioners. *George I. Haight* and *Robert F. Campbell* for respondent. Reported below: 176 F. 2d 783.

No. 487. Taylor, Executor, *v.* United States. Probate Court of Middlesex County, Massachusetts. Certiorari denied. *Waldo Noyes* and *Seneca B. Anderson* for petitioner. *Solicitor General Perlman, Assistant*

Attorney General Caudle, Ellis N. Slack and *Helen Goodner* for the United States. Reported below: See 324 Mass. 639, 88 N. E. 2d 121.

No. 491. COMMISSIONER OF INTERNAL REVENUE *v.* RICKENBERG, EXECUTRIX. C. A. 9th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Charles J. Munz, Jr.* for respondent. Reported below: 177 F. 2d 114.

No. 507. DAWSON COUNTY ET AL. *v.* HAGEN ET AL. C. A. 9th Cir. Certiorari denied. *Clarence Hanley* for petitioners. *H. Lowndes Maury* for Hagen et al., respondents. *Solicitor General Perlman* filed a memorandum for the United States, respondent, stating that it neither joins in nor opposes the petition. Reported below: 177 F. 2d 186.

No. 519. MENEES *v.* COWGILL ET AL. Supreme Court of Missouri. Certiorari denied. *John C. Grover* for petitioner. *Clarence G. Strop* and *E. R. Morrison* for respondents. Reported below: 359 Mo. 697, 223 S. W. 2d 412.

No. 533. LINCOLN ELECTRIC CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Ashley M. Van Duzer* and *Thomas V. Koykka* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 176 F. 2d 815.

No. 467. HALLE, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Edward Halle* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *S. Dee Hanson* for respondent. Reported below: 175 F. 2d 500.

No. 484. ARNOLD ET AL. *v.* MCAULIFFE ET AL. Supreme Court of Oklahoma. Certiorari denied. *James R. Eagleton* for petitioners. Reported below: 201 Okla. 639, 209 P. 2d 866.

No. 90, Misc. CROWE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 175 F. 2d 799.

No. 143, Misc. WIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Wm. R. Perdue* for petitioner. Reported below: 176 F. 2d 376.

No. 153, Misc. DORSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bart. A. Riley* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 174 F. 2d 899.

No. 241, Misc. BUTNER *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Leslie E. Higgins* for petitioner. *Alan Bible,* Attorney General of Nevada, *Geo. P. Annand, Robert L. McDonald,* Deputy Attorneys General, and *M. A. Diskin* for respondent. Reported below: 66 Nev. 127, 206 P. 2d 253.

No. 255, Misc. THOMPSON *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 267, Misc. TREMBOIS *v.* STANDARD RAILWAY EQUIPMENT MANUFACTURING CO. Appellate Court for the First District of Illinois. Certiorari denied. Petitioner *pro se. Vincent O'Brien* for respondent. Reported below: 337 Ill. App. 35, 84 N. E. 2d 862.

No. 282, Misc. CARTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 403 Ill. 567, 88 N. E. 2d 31.

Nos. 284 and 303, Misc. CAMERON *v.* SHAHEDY ET AL.; and

No. 285, Misc. CAMERON ET AL. *v.* SHAHEDY ET AL. C. A. 3d Cir. Certiorari denied. *Charlotte F. Jones* for petitioners. *Thomas M. Hyndman* for respondents.

No. 296, Misc. ELGESEM *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 297, Misc. BRAMBLE *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 298, Misc. LOWENSTEIN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 299, Misc. SMITH *v.* MICHIGAN. Circuit Court of Chippewa County, Michigan. Certiorari denied.

No. 300, Misc. SHERROW *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 304, Misc. CABRERA *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 306, Misc. GEISEL *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 308, Misc. CONIGLIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 299 N. Y. 744, 87 N. E. 2d 667.

No. 316, Misc. STORY *v.* BURFORD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 178 F. 2d 911.

No. 318, Misc. DAILEY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 319, Misc. MATHIS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 321, Misc. FARRANT *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 322, Misc. HOWARD *v.* SUPREME COURT OF INDIANA. Supreme Court of Indiana. Certiorari denied.

No. 326, Misc. BALLES *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 327, Misc. SADNESS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 300 N. Y. 69, 89 N. E. 2d 188.

No. 345, Misc. PEREZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Rose Rothenberg* for petitioner. Reported below: 300 N. Y. 208, 90 N. E. 2d 40.

No. 106, Misc. GRIFFIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Norman J. Griffin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl* for the United States. Reported below: 176 F. 2d 727.

Rehearing Denied.

No. 358. CASSELMAN ET AL. *v.* IDAHO, *ante*, p. 900;

No. 44, Misc. DALTON *v.* HUNTER, WARDEN, *ante*, p. 906;

No. 228, Misc. SHOTKIN *v.* PERKINS ET AL., and

No. 240, Misc. SHOTKIN *v.* PERKINS, *ante*, p. 907; and

No. 254, Misc. SCHECTMAN *v.* FOSTER, WARDEN, *ante*, p. 908. The petitions for rehearing in these cases are severally denied.

No. 539, Misc., October Term, 1948. WILSON *v.* HINMAN ET AL., 336 U. S. 970. Second petition for rehearing denied.

FEBRUARY 13, 1950.*

Per Curiam Decisions.

No. 419. PLANKINTON PACKING CO. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. Certiorari, 338 U. S. 898, to the Supreme Court of Wisconsin. Argued February 10, 1950. Decided February 13, 1950. *Per Curiam:* The judgment is reversed. *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767; *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18. *Richard S. Gibbs* argued the cause for petitioner. With him on the brief was *T. H. Spence.* By special leave of Court, *Mozart G. Ratner* argued the cause for the National Labor Relations Board, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Perlman, Robert L. Stern, Robert N. Denham* and *David P. Findling. Beatrice Lampert,* Assistant Attorney General of Wisconsin, argued the cause for the Wisconsin Employment Relations Board, respondent. With her on the brief were *Thomas E. Fairchild,* Attorney General, and *Stewart G. Honeck,* Deputy Attorney General. *David Beznor* argued the cause and filed a brief for Stokes, respondent. *Max Raskin* was of counsel for the United Packing House Workers (C. I. O.), respondent. Reported below: 255 Wis. 285, 38 N. W. 2d 688.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

No. 489. UNITED STATES SMELTING REFINING & MINING CO. ET AL. *v.* LOWE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The Court is of the opinion that a new trial should be granted. Accordingly, without expressing any opinion as to other questions presented, the judgments of the Court of Appeals and the District Court are vacated and the cause is remanded to the District Court with directions to grant a new trial. *Southall R. Pfund* for petitioners. *Blaine Hallock* and *James T. Donald* for respondent. Reported below: 176 F. 2d 813.

Certiorari Granted. (*See No. 489, supra.*)

Certiorari Denied.

No. 482. BOWERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bart. A. Riley* for petitioner. *Solicitor General Perlman, James M. McInerney* and *Robert S. Erdahl* for the United States. Reported below: 177 F. 2d 764.

No. 483. JOHN J. CASALE, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert H. McNeill* and *T. Bruce Fuller* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Elizabeth B. Davis* for the United States. Reported below: 114 Ct. Cl. 599, 86 F. Supp. 167.

No. 485. SHAIN *v.* SHAIN. Supreme Judicial Court of Massachusetts. Certiorari denied. *Archibald Palmer* for petitioner. *Frederick W. Mansfield* and *Albert Hurwitz* for respondent. Reported below: 324 Mass. 603, 88 N. E. 2d 143.

No. 488. NATIONAL MARITIME UNION OF AMERICA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A.

2d Cir. Certiorari denied. *Herman E. Cooper* and *H. Howard Ostrin* for petitioners. *Solicitor General Perlman, Robert N. Denham, David P. Findling* and *Fannie M. Boyls* for respondent. Reported below: 175 F. 2d 686.

No. 492. Missouri-Kansas-Texas Railroad Co. *v.* Oklahoma ex rel. Commissioners of the Land Office of Oklahoma et al. C. A. 10th Cir. Certiorari denied. *W. F. Semple* for petitioner. Reported below: 177 F. 2d 454.

No. 504. United States National Bank of Denver et al. *v.* Bartges. Supreme Court of Colorado. Certiorari denied. *John P. Akolt* for petitioners. *John F. Eberhardt* for respondent. Reported below: 120 Colo. 317, 210 P. 2d 600.

No. 505. Transport, Trading & Terminal Corp. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Arthur A. Ballantine* and *Charles C. MacLean, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 176 F. 2d 570.

No. 508. Owens *v.* United States. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 177 F. 2d 692.

Nos. 510 and 511. Chicago Transit Authority *v.* Illinois et al. C. A. 7th Cir. Certiorari denied. *Werner W. Schroeder* for petitioner. *John S. Boyle, Gordon B. Nash* and *Melvin F. Wingersky* for the State of

Illinois; and *Thomas Dodd Healy* for Sullivan, Trustee, respondents. Reported below: 177 F. 2d 860.

No. 515. ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* JENNINGS, ADMINISTRATRIX. Supreme Court of South Carolina. Certiorari denied. *Charles Cook Howell* for petitioners. *Donald Russell* for respondent. Reported below: 215 S. C. 404, 55 S. E. 2d 522.

No. 518. DOUGHERTY *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. *Sheldon E. Bernstein* for petitioner. *James D. Carpenter* and *Henry M. Hogan* for respondent. Reported below: 176 F. 2d 561.

No. 535. HORNER *v.* UNITED STATES. Court of Claims. Certiorari denied. Reported below: 114 Ct. Cl. 612, 86 F. Supp. 132.

No. 47, Misc. TOWNSEND *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se.* *Harold R. Fatzer,* Attorney General of Kansas, *L. P. Brooks* and *C. Harold Hughes,* Assistant Attorneys General, for respondent. Reported below: 167 Kan. 366, 205 P. 2d 483.

No. 125, Misc. SHELTON *v.* REED, SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman* for respondent.

No. 279, Misc. BLACK *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Joe McCoy* and *W. H. Glover* for petitioner. Reported below: 215 Ark. 618, 222 S. W. 2d 816.

No. 301, Misc. TATE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

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No. 178. BRYAN *v.* UNITED STATES, *ante*, p. 552;

No. 474. SMITH ET AL. *v.* O'DWYER, MAYOR, ET AL., *ante*, p. 937;

No. 260, Misc. PHILLIPS *v.* RAGEN, WARDEN, *ante*, p. 939; and

No. 295, Misc. COPLON *v.* REEVES ET AL., *ante*, p. 942.

The petitions for rehearing in these cases are severally denied.

AMENDMENT OF RULES.

ORDER.

IT IS ORDERED that Paragraph 9 of Rule 27 of the Rules of this Court be, and it hereby is, amended to read as follows:

"9. (a)—*Brief of an amicus curiae in cases before the Court on the merits:*—A brief of an *amicus curiae* may be filed only after order of the Court or when accompanied by written consent of all parties to the case and presented promptly after announcement postponing or noting probable jurisdiction on appeal, granting certiorari, or pertinent action in a case upon the original docket.

"(b)—*Brief of an amicus curiae prior to consideration of jurisdictional statement or a petition for writ of certiorari:*—A brief of an *amicus curiae* filed with consent of the parties, or motion, independent of the brief, for leave to file when consent is refused may be filed only if submitted a reasonable time prior to the consideration of a jurisdictional statement or a petition for writ of certiorari. Such motions are not favored. Distribution to the Court under the applicable rules of a jurisdictional statement or a petition for writ of certiorari and its consideration thereof will not be delayed pending the receipt of such brief or the filing of such motion.

"(c)—*Motion for leave to file:*—When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion, independent of the brief, for leave to file may timely be presented to the Court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case. A party served with such motion may seasonably file in this Court an objection concisely stating the reasons for withholding consent.

"(d)—*Consent not required:*—Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State sponsored by its Attorney General; or for a political subdivision of a State sponsored by the authorized law officer thereof.

"(e)—*Signature of a member of the bar of this Court and proof of service required:*—All briefs and/or motions filed under this Rule shall bear the signature of a member of the Bar of this Court, and shall be accompanied by proof of service on all parties to the case."

NOVEMBER 14, 1949.

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